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No. 09-10-53

IN THE

Supreme Court of the United States

BRENDAN DOLAN, *et al.*,
Petitioners,

v.

FIDELITY NATIONAL TITLE INSURANCE COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In applying the filed rate doctrine, which prevents courts from "independently apprais[ing] the reasonableness of rates" approved by an agency, can a court disregard the limit on the doctrine imposed in *In re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 638 n.17 (1978), by refusing to hear a case "inquiring whether the [agency] has overstepped the bounds of its authority" or otherwise acted in an arbitrary or capricious manner?

PARTIES TO THE PROCEEDING

Petitioners, on behalf of themselves and those similarly situated, are the following individuals and businesses who purchased title insurance in New York from one of the respondent title insurance companies: Brendan Dolan, Brian McHale, Jonathan Rapaport, Thomas Perry, MBSF Alabama LLC, Joseph Ragusa, Kristen Ragusa, Marshall Cook, Douglas Brown, Rebecca Brown, Alex Wintner, Tuttnauer USA Co., Ltd., Lawrence Fisher, Rigoberto Capellan, Valerio Gonzalez, Maria Elena Ochoa, Lenny Gonzalez, Christopher P. Ajemian, Sara Juli, Vincent Barbieri, Teresa Tannazzo Barbieri, Michael Lollo, Maeghan Lollo, Brandon Raymar, Melinda Raymar, and John Sheridan.

Respondents comprise the country's four largest title insurance companies and TIRSA (the Title Insurance Rate Service Association, Inc.), the New York title insurance collective rate-setting body they control. Respondent title insurance companies, which are all members of the Fidelity, First American, LandAmerica, or Stewart families of title insurance companies, are: Fidelity National Title Insurance Company, Chicago Title Insurance Company, Ticor Title Insurance Company, Fidelity National Financial, Inc., First American Title Insurance Company of New York, United General Title Insurance Company, First American Corporation, Commonwealth Land Title Insurance Company, Lawyers Title Insurance Corporation, LandAmerica Financial Group, Inc., Stewart Title Insurance Company, Monroe Title Insurance Corporation, Stewart Information Services Corporation, and Stewart Title Guaranty Company.

RULE 29.6 STATEMENT

Petitioner MBSF Alabama LLC discloses that its parent corporation is Bronfman Fisher Real Estate Holdings, LLC, but that no publicly held company owns ten percent or more of MBSF Alabama LLC's stock. Petitioner Tuttnauer USA Co., Ltd. discloses that its parent corporation is Tuttnauer, Ltd., which is a publicly held corporation that owns more than ten percent of the stock of Tuttnauer USA Co., Ltd. No other Petitioner has a parent corporation or issues stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
RULE 29.6 STATEMENT	iii
TABLE OF AUTHORITIES	viii
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
I. INTRODUCTION	2
II. THE ALLEGED PRICE-FIXING AGREEMENT	4
III. NEW YORK'S FAILED TITLE INSURANCE REGIME	5
A. The Statutory Scheme	5
B. The Regulatory Breakdown	6
IV. THE DECISIONS BELOW	8
REASONS FOR GRANTING THE PETITION	9
I. THE SECOND CIRCUIT REFUSED TO FOLLOW THIS COURT'S HOLDING THAT THE FILED RATE DOCTRINE DOES NOT APPLY WHEN THE AGENCY ACTS OUTSIDE ITS AUTHORITY	9
A. The Filed Rate Doctrine Bars Challenges to the Reasonableness of Filed Rates, Not to the Agency's Authority to Approve Them in the First Place	9

TABLE OF CONTENTS—Continued

Page

B. The Underlying Purpose of the Filed Rate Doctrine is Not Served By Applying it to Challenges to Agency Authority 12

C. Permitting the Filed Rate Doctrine to Bar Challenges to Agency Authority Threatens to Exacerbate Agency Failures 13

II. THE SECOND CIRCUIT'S EXPANSION OF THE FILED RATE DOCTRINE HERE DIRECTLY CONFLICTS WITH DECISIONS OF THE FIFTH, EIGHTH, NINTH, TENTH, AND FEDERAL CIRCUITS 13

III. PERSISTENT JUDICIAL AND ACADEMIC CRITICISM OF THE FILED RATE DOCTRINE CAUTIONS AGAINST EXPANDING IT FURTHER, AS THE SECOND CIRCUIT'S DECISION WOULD DO 16

CONCLUSION 20

APPENDICES

APPENDIX A - *Dolan* v. *Fid. Nat'l Title Ins. Co.*, No. 09-2697-cv, 2010 WL 457318 (2d Cir. Feb. 11, 2010) 1a

APPENDIX B - *Dolan* v. *Fid. Nat'l Title Ins. Co.*, No. 08-CV-00466(TCP)(WDW), 2009 WL 3934153 (E.D.N.Y. June 17, 2009) 11a

APPENDIX C - *Dolan* v. *Fid. Nat'l Title Ins. Co.*, No. 09-2697-cv (2d Cir. Apr. 7, 2010) 18a

TABLE OF CONTENTS—Continued

Page

APPENDIX D - N.Y. Ins. Law § 2101 (McKinney 2009) 20a

APPENDIX E - N.Y. Ins. Law § 2301 (McKinney 2009) 39a

APPENDIX F - N.Y. Ins. Law § 2303 (McKinney 2009) 40a

APPENDIX G - N.Y. Ins. Law § 2304 (McKinney 2009) 41a

APPENDIX H - N.Y. Ins. Law § 2305 (McKinney 2009) 46a

APPENDIX I - N.Y. Ins. Law § 2306 (McKinney 2009) 51a

APPENDIX J - N.Y. Ins. Law § 2315 (McKinney 2009) 52a

APPENDIX K - N.Y. Ins. Law § 6401 *et seq.* (McKinney 2009) 55a

APPENDIX L - Complaint, *Dolan* v. *Fid. Nat'l Title Ins. Co.*, No. 08-CV-00466(TCP) (WDW) (E.D.N.Y. filed July 11, 2008) 77a

APPENDIX M - N.Y. STATE INS. DEP'T TITLE INS. MEM. DECISION & OPINION (Nov. 19, 1991) 118a

TABLE OF AUTHORITIES

CASES Page

Aberdeen & Rockfish R.R. Co. v. *United States*, 682 F.2d 1092 (5th Cir. 1982)..... 14, 15
Am. Tel. & Tel. Co. v. *Cent. Office Tel., Inc.*, 524 U.S. 214 (1998)..... 10, 12
Arroyo-Melecio v. *Puerto Rican Am. Ins. Co.*, 398 F.3d 56 (1st Cir. 2005)..... 17
Atlantis Express, Inc. v. *Associated Wholesale Grocers, Inc.*, 989 F.2d 281 (8th Cir. 1993)..... 14
Brown v. *Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992)..... 15
Cantor v. *Detroit Edison Co.*, 428 U.S. 579 (1976)..... 19
Chevron U.S.A., Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)..... 10
Davel Commc'ns, Inc. v. *Qwest Corp.*, 460 F.3d 1075 (9th Cir. 2006)..... 14
Dolan v. *Fid. Nat'l Title Ins. Co.*, No. 08-CV-00466, 2009 WL 3934153 (E.D.N.Y. June 17, 2009)..... 1, 8
Dolan v. *Fid. Nat'l Title Ins. Co.*, No. 09-2697-cv, 2010 WL 457318 (2d Cir. Feb. 11, 2010).....1, 3, 8, 9, 11
Dolan v. *Fid. Nat'l Title Ins. Co.*, No. 09-2697-cv (2d Cir. Apr. 7, 2007)..... 2
E. & J. Gallo Winery v. *Encana Corp.*, 503 F.3d 1027 (2007) 15, 17
ETSI Pipeline Project v. *Missouri*, 484 U.S. 495 (1988)..... 10
Fax Telecomm. v. *Am. Tel. & Tel. Co.*, 138 F.3d 479 (1998) 17
FDA v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000)..... 10

TABLE OF AUTHORITIES—Continued

Page

In re Trans Alaska Pipeline Rate Cases, 436 U.S. 631 (1978) 3, 9, 10, 11, 15, 18
Interstate Commerce Comm'n v. *Transcon Lines*, 513 U.S. 138 (1995) 14
Keogh v. *Chicago & Nw. Ry. Co.*, 260 U.S. 156 (1922) 16
Leedom v. *Kyne*, 358 U.S. 184 (1958) 10
Maislin Indus., U.S., Inc. v. *Primary Steel, Inc.*, 497 U.S. 116 (1990) 12, 17
MCI Telecomms. Corp. v. *Am. Tel. & Tel. Co.*, 512 U.S. 218 (1994) 17
Montana-Dakota Utils. Co. v. *N.W. Pub. Serv. Co.*, 341 U.S. 246 (1951) 12
Otter Tail Power Co. v. *United States*, 410 U.S. 366 (1973) 19
PUD No. 1 of Snohomish Cnty. v. *Dynegy Power Mktg, Inc.*, 384 F.3d 756 (9th Cir. 2004) 18
Reiter v. *Cooper*, 507 U.S. 258 (1993) 10
Sea-Land Servs., Inc. v. *Danzig*, 211 F.3d 1373 (Fed. Cir. 2000) 15
Sec. Servs., Inc. v. *Kmart Corp.*, 511 U.S. 431 (1994) 17
Square D Co. v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986) 16, 17, 18
Square D Co. v. *Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 1347 (2d Cir. 1985) 16
Taffet v. *S. Co.*, 967 F.2d 1483 (11th Cir. 1992) 18
TON Servs., Inc. v. *Qwest Corp.*, 493 F.3d 1225 (10th Cir. 2007) 14

TABLE OF AUTHORITIES—Continued

Page

Town of Norwood v. *New Eng. Power Co.*, 202 F.3d 408 (1st Cir. 2000) 17, 18
United States v. *Phila. Nat'l Bank*, 374 U.S. 321 (1963) 19
Wegoland Ltd. v. *NYNEX Corp.*, 27 F.3d 17 (2d Cir. 1994) 18

STATUTES

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1331 2
28 U.S.C. § 1367 2
N.Y. Ins. Law § 2101 (McKinney 2009) 2, 6
N.Y. Ins. Law § 2101(a)(4) (McKinney 2009) 6, 9, 11
N.Y. Ins. Law § 2301 *et seq.* (McKinney 2009) 2, 5
N.Y. Ins. Law § 2304(a) (McKinney 2009) ... 11
N.Y. Ins. Law § 2305(b) (McKinney 2009) ... 5
N.Y. Ins. Law § 2305(c)-(d) (McKinney 2009) 11
N.Y. Ins. Law § 2306 (McKinney 2009) 5
N.Y. Ins. Law § 6401 *et seq.* (McKinney 2009) 2, 5
N.Y. Ins. Law § 6409(b) (McKinney 2009) ... 5
N.Y. Ins. Law § 6409(d)-(e) (McKinney 2009) 11

MISCELLANEOUS

IA AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 247b (3d ed. 2006) 17
WILLIAM C. HOLMES, ANTITRUST LAW HANDBOOK § 8:6 (2007) 19

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Second Circuit decision is available at 2010 WL 457318. App. A.[1] The district court decision is available at 2009 WL 3934153. App. B.

JURISDICTION

The Second Circuit issued its decision on February 11, 2010. Petitioners sought rehearing en banc which

[1] References to "App. __" refer to the Appendix submitted herewith. References to "Compl. ¶__" refer to the operative complaint in this action which can be found at App. L.

the Second Circuit denied on April 7, 2010. App. C. This Court has jurisdiction under 28 U.S.C. § 1254(1). The jurisdiction of the court of first instance was invoked for the federal claims under 28 U.S.C. § 1331, and for the state claims under 28 U.S.C. § 1367.

STATUTORY PROVISIONS INVOLVED

This petition involves Articles 21, 23, and 64 of the New York Insurance Law, N.Y. Ins. Law §§ 2101, 2301 *et seq.*, and 6401 *et seq.* (McKinney 2009), the relevant portions of which are appended hereto. App. D–K.

STATEMENT OF THE CASE

I. INTRODUCTION

In applying the filed rate doctrine to New York's title insurance regime, the Second Circuit improperly afforded *absolute* deference to an agency that has acted arbitrarily and capriciously and outside its authority. Thus, it did not matter to the court that without authority over title agents, the New York Insurance Department also lacks the authority to review the bulk of the costs that make up respondents' collectively-set title rates. Nor did it matter that the Insurance Department continues to accept and approve these rates even while acknowledging that it has no understanding of the costs and services they are supposed to cover. Nor did it matter that the New York Insurance Law and governing regulations nowhere define the costs and services that are even allowed to be covered by the filed rates.

It did not even matter to the court that respondents' rate filings violate the clear provisions of the Insurance Law, and are based largely on charges for

services unrelated to the issuance of title insurance. According to the Second Circuit, none of these regulatory specifics are relevant. All that matters is that respondents' rates have been filed with and approved by the Insurance Department. According to the Second Circuit, the rates are therefore "per se reasonable and unassailable" under the filed rate doctrine. 2010 WL 457318, at *1 (App. A at 2a).

The Second Circuit's rigid application of the filed rate doctrine, particularly in the context of such a regulatory breakdown, directly conflicts with decisions of this Court and of the Fifth, Eighth, Ninth, Tenth and Federal Circuits. These decisions make clear that such a per se application of the doctrine is not appropriate and that, while "courts may not independently appraise the reasonableness of rates, no such appraisal is involved in inquiring whether the [agency] has overstepped the bounds of its authority." *Trans Alaska*, 436 U.S. at 638 n.17.

Supreme Court review is necessary to correct the Second Circuit's decision and reconcile it with the decisions of this Court and other circuits that refused to apply the filed rate doctrine under similar circumstances. Supreme Court review is particularly warranted here given the potential ramifications of this decision that extend well beyond the parties to this action. The Second Circuit's decision, if allowed to stand, will invite agencies across the country to ignore both the limits of their statutory authority and the ultimate purpose of their legislative command.

Equally important, this case poses the related question of whether this Court wishes to maintain *any* limits on the filed rate doctrine, no matter how irrational or unanchored from statutory authority the regulator's conduct might be. In recent years, courts

have expanded the filed rate doctrine far beyond its original purpose. Courts have done this despite the doctrine's widespread criticism and despite this Court's directive to avoid implied repeals of the antitrust laws. With its decision below, the Second Circuit has gone even further and abandoned entirely the logic on which the doctrine was founded. In so doing, the Second Circuit has relinquished its responsibility to prohibit unauthorized or arbitrary regulatory conduct. This case offers the Court a perfect opportunity to halt the unbridled expansion of the filed rate doctrine and reaffirm the boundaries of its scope and application, namely, barring challenges only to the reasonableness of a filed rate, and *not* to whether the agency has the authority to assess the rates in the first place.

II. THE ALLEGED PRICE-FIXING AGREEMENT

This action challenges as an illegal price-fixing agreement the concerted efforts of respondents – which include the country's four largest title insurance companies and TIRSA, the collective rate setting body they control – to exploit and exacerbate the regulatory breakdown in New York's title insurance regime. Specifically, respondents have structured their collectively-set title rates so that 85 percent of the costs they comprise – the so-called "agency commissions" paid to title agents – fall outside the Insurance Department's jurisdictional reach and review. The Department does not see what these costs include, and New York's insurance laws do not define the services they are supposed to cover. Free from regulatory oversight, respondents have padded their title rates with charges for services entirely unrelated to the issuance of title insurance.

III. NEW YORK'S FAILED TITLE INSURANCE REGIME

A. The Statutory Scheme

Articles 23 and 64 of the New York Insurance Law govern the conduct of title insurers in New York. N.Y. Ins. Law §§ 2301 *et seq.*, 6401 *et seq.* (App. E–K). They also set forth the scope of authority the New York Insurance Department has to regulate title insurers in New York. The ultimate purpose of these provisions and of the Insurance Department's statutory mandate generally is to ensure that New York title insurance rates are not "excessive, inadequate or unfairly discriminatory." N.Y. Ins. Law § 2301 (App. E). In order for the Insurance Department to comply with its statutory mandate of ensuring reasonable title rates, title insurers must file their rates with the Insurance Department. N.Y. Ins. Law §§ 2305(b), 6409(b) (App. H at 46a-47a, App. K at 72a-73a). In New York, the title insurers collectively set and file their rates through TIRSA. N.Y. Ins. Law § 2306 (App. I); Compl. ¶¶ 2, 38 (App. L at 78a-79a, 89a-90a).

There are two principal cost components that go into TIRSA's rate calculation. One covers the risk the title insurer bears for any undiscovered defects in the title. The other covers the "agency commissions" that title insurers pay title agents. The Insurance Department does not know what is contained in this "black box" of supposed costs. However, the bulk of these payments appears to be related to kickbacks, other financial inducements title insurers provide to title agents to steer business their way, and other charges entirely unrelated to the business of title insurance. Compl. ¶¶ 46-49 (App. L at 92a-93a). The Insurance Department does not have regulatory

authority over title agents or their activities. N.Y. Ins. Law § 2101 (App. D); Compl. ¶¶ 3-4, 64 (App. L at 79a-80a, 99a-100a). In fact, title agents are explicitly exempted from the scope of the Insurance Department's jurisdiction. N.Y. Ins. Law § 2101(a)(4) (App. D at 20a, 22a). Yet roughly 85 percent of the total title insurance premium is based on the "costs" associated with these agency commission payments. Compl. ¶ 50 (App. L at 94a).

B. The Regulatory Breakdown

The Insurance Department has no ability or authority to review these agency commission charges. Respondents do not provide with their rate filings any supporting detail that explains the charges or services they supposedly cover. They provide only a single aggregate number that represents their total agency commission payments.[2] Respondents claim that they do not have the detailed backup information for their agency commission payments; only the title agents do. But the Insurance Department cannot get this information from title agents because it lies outside the Department's jurisdictional reach. Nor can the Insurance Department get this information from any general understanding of what these costs comprise, because the Insurance Law does not define agency commissions or the costs and services they are supposed to cover.

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[2] Respondents' failure to provide *any* detail to support the agency commissions portion of their title rates contrasts sharply with the significant detail they provide to support the so-called "risk" component of their rates. For this portion, which makes up the remaining 15 percent of the title premium, respondents provide pages and pages of backup fully detailing how it is derived and the services it covers. This case does not challenge the risk component of respondents' title rates.

The Insurance Department has repeatedly acknowledged that without authority over title agents, it cannot obtain the information on agency commissions it needs to assess the reasonableness of respondents' collectively-set rates, and whether they otherwise comply with the Insurance Law. The Insurance Department acknowledged this regulatory gap in 1991 when it first authorized the creation of respondents' rate setting body, TIRSA.[3] It acknowledged this gap again in 2006 when it held a public hearing which addressed respondents' perennial failure to provide it with any detail on their agency commissions.[4] And, it has acknowledged this gap in its recurring calls for legislation to provide it with authority over title agents. Compl. ¶ 64 (App. L at 99a-100a), App. M at 133a-136a.

The Government Accountability Office has confirmed this regulatory breakdown in New York's title insurance regime. In its 2007 study of the New York title industry, it concluded that "state regulators have not collected the type of data, *primarily on title agents' costs and operations*, needed to analyze

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[3] See, *e.g.*, App. M at 134a (Insurance Department recognizing that only with authority over title agents would it be able "to obtain the information necessary to regulate appropriately all major facets of the title insurance industry."); *id.* at 131a ("Absent access to * * * industry-wide data * * *, it is difficult to evaluate the extent to which title insurance rate levels comply with Article 23 standards."); *ibid.* ("Scrutiny of industry-wide data, yet to be compiled, is required to truly determine whether title insurance rates are too low or too high.").

[4] See, *e.g.*, Compl. ¶ 60 (App. L at 98a) ("I think that's really an area we need to explore. I don't know how to do that. It seems like it's a significant piece and it doesn't seem like anyone is really telling us what goes into that.") (statement of general counsel of New York Insurance Department).

premium prices and underlying costs." Compl. ¶ 62 (App. L at 99a). Despite this well-recognized regulatory failure, the Insurance Department has continued to arbitrarily accept and approve respondents' collectively-set title rates, never once seeing (let alone challenging) what actually goes into the 85-percent portion covering agency commissions. The end result is that New York's title premiums are among the highest in the country, more than quadrupling over the past decade (from $260 million to $1.2 billion), and largely comprised of costs specifically barred under the Insurance Law and that have nothing to do with title insurance. Compl. ¶¶ 3-5, 40, 49, 56, 69-75 (App. L at 79a-80a, 90a, 93a, 96a, 101a-103a).

IV. THE DECISIONS BELOW

Notwithstanding this regulatory collapse, the district court dismissed the Complaint under the filed rate doctrine. App. B. The court found that respondents' title rates were filed with and approved by the Insurance Department and that "[n]othing more is required for the filed rate doctrine to apply." 2009 WL 3934153, at *3 (App. B at 16a-17a). The court performed no other analysis.

The Second Circuit affirmed the dismissal with a similarly mechanical application of the filed rate doctrine. App. A. The court's decision is based on inherently contradictory reasoning. It rests on "skeptic[ism] that any relevant regulatory gap exists." 2010 WL 457318, at *2 (App. A at 5a). This skepticism is apparently grounded in the court's view that if the Insurance Department required more information to review respondents' rates, it had the authority to either request such information or reject the rates. *Id.* at 4a. However, the court failed to

reconcile this finding with its recognition that "title insurance agents are excluded from the definition of 'insurance agent' in New York Insurance Law § 2101(a)(4)." 2010 WL 457318, at *2 (App. A at 5a). By ignoring this clear "regulatory gap," the Second Circuit was able to sidestep any discussion of this Court's precedent in *Trans Alaska*, or the plain limit on the filed rate doctrine it established.

In reaching its decision, the court further ignored the Insurance Department's repeated admission that it does not have the ability or authority to get the needed information on agency commission payments. The court also ignored that respondents' rate filings violated the express provisions of the Insurance Law. And ultimately, the court ignored that the Insurance Department's acceptance and approval of respondents' rates anyway – without any understanding of the costs or services covered by 85 percent of the rates – was arbitrary and capricious and violated its mandate of ensuring reasonable title rates.

REASONS FOR GRANTING THE PETITION

I. THE SECOND CIRCUIT REFUSED TO FOLLOW THIS COURT'S HOLDING THAT THE FILED RATE DOCTRINE DOES NOT APPLY WHEN THE AGENCY ACTS OUTSIDE ITS AUTHORITY.

A. The Filed Rate Doctrine Bars Challenges to the Reasonableness of Filed Rates, Not to the Agency's Authority to Approve Them in the First Place.

The Supreme Court has been clear that neither the filed rate doctrine, nor any other principle of agency deference, applies where the agency has acted arbitrarily, capriciously or outside its authority. See, *e.g.*,

Trans Alaska, 436 U.S. at 638 n.17 (distinguishing between assessing "reasonableness of rates" and whether agency has "overstepped the bounds of its authority"); *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (no deference when agency action is "arbitrary, capricious, or manifestly contrary to the [governing] statute").[5] In accepting and approving respondents' rates – when it has neither the ability nor authority to review the bulk of the costs and services they comprise, and when they otherwise violate the Insurance Law – that is precisely how the Insurance Department has acted here.

Whatever skepticism the Second Circuit may have had regarding the regulatory gap petitioners have alleged, the fact remains that the Insurance Department cannot possibly assess the reasonableness of respondents' title insurance rates when it does not know what goes into them or what services they are supposed to cover. The Insurance Department has admitted just that. So the court's focus on the

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[5] See also *Leedom* v. *Kyne*, 358 U.S. 184, 188 (1958) (permitting review of agency action "in excess of its delegated powers and contrary to a specific prohibition in the Act"); *ETSI Pipeline Project* v. *Missouri*, 484 U.S. 495, 517 (1988) (no deference to agency acting "in a manner that is inconsistent with the administrative structure that Congress enacted into law"); *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) (permitting review of whether agency action was "grounded in a valid grant of authority"). *Cf. Reiter* v. *Cooper*, 507 U.S. 258, 265-66 (1993) (refusing to apply filed rate doctrine to prevent judicial enforcement of statutory provision); *Am. Tel. & Tel. Co.* v. *Cent. Office Tel., Inc.*, 524 U.S. 214, 229 (1998) (Rehnquist, C.J., concurring) ("In order for the filed-rate doctrine to serve its purpose, therefore, it need pre-empt only those suits that seek to *alter* [as opposed to enforce] the terms and conditions provided for in the tariff") (emphasis added).

Department's "authority over title insurance *rates*," 2010 WL 457318, at *2 (App. A. at 5a) (emphasis in original), is beside the point. Regardless of this general authority, the Insurance Department does not have the authority to accept and approve rates comprised of costs for services unrelated to the issuance of title insurance, and which fall outside of the agency's jurisdictional reach. See N.Y. Ins. Law § 2101(a)(4) (App. D).

The Insurance Department likewise has no authority to accept and approve rates that violate the plain provisions of the Insurance Law. But again, that is exactly what the Insurance Department has done. Respondents' rate filings do not contain any of the required cost information on agency commissions. See N.Y. Ins. Law §§ 2304(a), 2305(c) and (d) (App. G at 41a, App. H at 47a-48a) (requiring "sufficient" cost information to enable Department to assess reasonableness of rates). And they include agency kickbacks and other explicitly prohibited costs. See *id.* § 6409(d) and (e) (App. K at 73a) (prohibiting rates from including kickbacks and other financial inducements).

The filed rate doctrine thus does not bar petitioners' challenge here. That is because they are not challenging the *reasonableness* of respondents' rates. Rather, petitioners are challenging the authority of the Insurance Department to approve these rates in the first place. This latter type of challenge remains within the clear province of the courts. The Second Circuit made no effort to reconcile its decision with this clear distinction outlined in *Trans Alaska* and this Court's related precedent. The court ignored this authority altogether.

B. The Underlying Purpose of the Filed Rate Doctrine is Not Served By Applying it to Challenges to Agency Authority.

The underlying purpose of the filed rate doctrine further demonstrates why it does not apply to these kinds of challenges to agency authority. There are two key motivations underlying the doctrine. The first, the so-called "justiciability" rationale, is to keep courts out of the ratemaking process and leave it to the agencies with the authority and expertise to do the job. See, *e.g.*, *Montana-Dakota Utils. Co.* v. *N.W. Pub. Serv. Co.*, 341 U.S. 246, 251 (1951). The second, the "discrimination" rationale, is to ensure that all ratepayers pay the same rates for the same service. See, *e.g.*, *Maislin Indus., U.S., Inc.* v. *Primary Steel*, 497 U.S. 116, 121-126 (1990).

Neither of these underlying purposes is implicated when a court is called upon to assess whether the agency in approving rates has acted within its authority and otherwise complied with the governing law. Indeed, from a justiciability standpoint, a court is much better situated to make this determination than the agency itself. And from a price discrimination standpoint, where, like here, the agency has no idea what services are actually covered by the filed rates, a court may be the only means of ensuring that ratepayers are paying the same rates for the same services. See *Am. Tel. & Tel. Co.* v. *Cent. Office Tel., Inc.*, 524 U.S. 214, 223 (1998) ("Rates * * * do not exist in isolation. They have meaning only when one knows the services to which they are attached."). Additionally, if an agency acts outside its authority in approving the rates, they are invalid and cannot be

applied in a discriminatory fashion; they will apply to no one.

C. Permitting the Filed Rate Doctrine to Bar Challenges to Agency Authority Threatens to Exacerbate Agency Failures.

The significance of the Second Circuit's expansion of the filed rate doctrine here goes well beyond the specific challenge petitioners have made to the New York title insurance regime. It risks infecting regulated industries throughout the country. It does so by serving notice that regardless of the rate-setting agency action – whether it be agency excess or complete abdication – the courts will look the other way. Even worse, it provides an invitation to exploit agency failures. That is precisely what respondents have done here by extracting excessive and unauthorized title insurance premiums outside the Insurance Department's jurisdictional reach and review. The filed rate doctrine was never intended to immunize this kind of regulatory gamesmanship.

II. THE SECOND CIRCUIT'S EXPANSION OF THE FILED RATE DOCTRINE HERE DIRECTLY CONFLICTS WITH DECISIONS OF THE FIFTH, EIGHTH, NINTH, TENTH, AND FEDERAL CIRCUITS.

In applying the filed rate doctrine to an agency that has acted outside its authority, the Second Circuit's decision directly conflicts with the Fifth, Eighth, Ninth, Tenth, and Federal Circuits, which have explicitly refused to expand the doctrine that far. For example, when these other courts were presented with rate filings that violated the governing law, like respondents' filings do here, they

refused to apply the doctrine. Their reasoning was clear. "[A] tariff not filed and published in accordance with statutory or regulatory provisions is not lawfully on file." *Aberdeen & Rockfish R.R. Co.* v. *United States*, 682 F.2d 1092, 1102 (5th Cir. 1982). As such, "they may not lawfully be used (and) have no proper place in our files." *Id.* at n.13 (internal quotation marks and citation omitted).

These courts have therefore required as a prerequisite for applying the filed rate doctrine that the regulated entity "show that it has done what the regulations * * * require for effective filing." *Atlantis Express, Inc.* v. *Associated Wholesale Grocers, Inc.*, 989 F.2d 281, 284 (8th Cir. 1993). See *Interstate Commerce Comm'n* v. *Transcon Lines*, 513 U.S. 138, 147 (1995) ("[c]arriers must comply with the comprehensive scheme provided by the statute and regulations promulgated under it"); *TON Servs., Inc.* v. *Qwest Corp.*, 493 F.3d 1225, 1237 (10th Cir. 2007) (quoting same); *Davel Commc'ns, Inc.* v. *Qwest Corp.*, 460 F.3d 1075, 1085 (9th Cir. 2006) (quoting same).

The Tenth Circuit decision in *TON* is particularly on point. There, the court refused to apply the filed rate doctrine in light of the plaintiff's claims that (i) the defendant failed to provide necessary "supporting cost data" with its filed rates – just like respondents have failed to do here; and (ii) this failure "precluded regulators from determining * * * compliance" with the filing requirements – just like respondents' failure has done here. 493 F.3d at 1237. However, unlike the Second Circuit here, the Tenth Circuit in *TON* concluded that until the question of the defendant's alleged statutory violations was resolved, it would be "impossible" to apply the filed rate doctrine. *Id.* at 1237 n.15.

The Federal Circuit reached a similar conclusion in *Sea-Land Services, Incorporated* v. *Danzig*, 211 F.3d 1373 (Fed. Cir. 2000). That case, again like this one, involved a challenge to the legitimacy of a filed rate that violated a statutory provision. The court refused to apply the doctrine finding that it "does not immunize a tariff from challenge if the tariff is contrary to a statutory prohibition." *Id.* at 1380. The fact that the subject rate was filed with and approved by the governing agency was of no moment. Following the Fifth Circuit's reasoning in *Aberdeen*, the Federal Circuit concluded that "if the filed tariff is at odds with the [governing law], it is unlawful and may not be imposed." *Ibid.* See *Aberdeen*, 682 F.2d at 1102 (rejecting doctrine, finding "that tariffs not exhibiting the required symbols are not 'lawfully on file'") (internal citation omitted).

The Ninth Circuit decision in *E. & J. Gallo Winery* v. *Encana Corporation*, 503 F.3d 1027 (2007), is similarly on point. The court there refused to apply the filed rate doctrine to block a challenge to rates that – like respondents' rates here – were based on charges that fell outside the agency's jurisdictional reach. *Id.* at 1045, 1048-49. And the Ninth Circuit again, in *Brown* v. *Ticor Title Insurance Company*, 982 F.2d 386 (9th Cir. 1992), refused to apply the doctrine because the agencies at issue there – like the New York Insurance Department here – lacked the authority to assess the reasonableness of the filed rates. The *Brown* decision is particularly noteworthy because, like the case here, it considered the filed rate doctrine in the context of title insurance.

Each of these decisions from these other circuits embraced the basic distinction this Court articulated in *Trans Alaska* between assessing rates and assess-

ing the agency's competence and authority to set the rates in the first place. The filed rate doctrine bars only the former type of challenge. In ignoring this fundamental distinction – and barring petitioners' challenge here to the Insurance Department's review and approval of rates it had no ability or authority to review, and which otherwise violated the governing law – the Second Circuit created a clear split with these other circuits on the outer limits of the filed rate doctrine.

III. PERSISTENT JUDICIAL AND ACADEMIC CRITICISM OF THE FILED RATE DOCTRINE CAUTIONS AGAINST EXPANDING IT FURTHER, AS THE SECOND CIRCUIT'S DECISION WOULD DO.

In *Square D Company* v. *Niagara Frontier Tariff Bureau, Incorporated*, 476 U.S. 409 (1986), the Court's most thorough treatment of the filed rate doctrine in recent years, the Court acknowledged the widespread criticism surrounding the continued application of the doctrine. According to Justice Stevens, speaking for eight unanimous justices, "various developments * * * seem to undermine some of the reasoning in Justice Brandeis' *Keogh* opinion," the decision from which the filed rate doctrine originated. *Id.* at 423 (*citing Keogh* v. *Chicago & Nw. Ry. Co.*, 260 U.S. 156 (1922)). These developments, and the reasons for dismantling the doctrine, were pointedly detailed by Judge Friendly in his oft-cited criticism of the doctrine in the court of appeals decision in *Square D Company* v. *Niagara Frontier Tariff Bureau, Incorporated*, 760 F.2d 1347, 1352-54 (2d Cir. 1985).

Judge Friendly and Justice Stevens are not alone. Numerous other courts have wrestled with the questionable logic and continued application of the

filed rate doctrine. See *Sec. Servs., Inc.* v. *Kmart Corp.*, 511 U.S. 431, 440 (1994) (recognizing debate about the "wisdom of the filed rate doctrine"); *MCI Telecomms. Corp.* v. *Am. Tel. & Tel. Co.*, 512 U.S. 218, 234 (1994) ("there is considerable 'debate * * * about the wisdom of the filed rate doctrine'") (quoting *Kmart*, 511 U.S. at 440); *Fax Telecomm.* v. *Am. Tel. & Tel. Co.*, 138 F.3d 479, 491 (1998) (same); *Arroyo-Melecio* v. *Puerto Rican Am. Ins. Co.*, 398 F.3d 56, 73 (1st Cir. 2005) ("the law on the filed rate doctrine is extremely creaky") (*quoting Town of Norwood* v. *New Eng. Power Co.*, 202 F.3d 408, 420 (1st Cir. 2000)). See also *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 127 (1990) ("This rule is undeniably strict and it obviously may work hardship.") (internal citation omitted).

While all of this criticism does not necessarily merit revoking the doctrine, it highlights the need to prevent it from expanding even further:

> [T]he best policy is generally to construe irrational doctrines narrowly and, as the Supreme Court virtually conceded in *Square D*, the filed rate doctrine in antitrust is in large measure irrational and justifiable only on grounds of stare decisis.

IA AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 247b, at 419 (3d ed. 2006). Unfortunately, many courts have gone in the opposite direction and continued to expand the scope of the filed rate doctrine well beyond its original design. As Judge Fletcher on the Ninth Circuit has lamented, "the Filed Rate Doctrine threatens to come unmoored from its rationale of respecting the actions of a federal agency to which Congress has delegated authority." *Gallo*, 503 F.2d at 1050 (B. Fletcher, J., concurring)

Courts, for example, have come to apply the doctrine to bar suits involving rates set by state agencies over which the United States Congress has no authority. See, *e.g.*, *Taffet* v. *S. Co.*, 967 F.2d 1483, 1494 (11th Cir. 1992). They apply the doctrine to bar state causes of action. *Wegoland Ltd.* v. *NYNEX Corp.*, 27 F.3d 17, 20 (2d Cir. 1994). They apply the doctrine to bar suits involving market-based rates over which agencies have at best attenuated oversight responsibilities. *PUD No. 1 of Snohomish Cnty.* v. *Dynegy Power Mktg, Inc.*, 384 F.3d 756, 761 (9th Cir. 2004). They even apply the doctrine to bar suits where a company merely files a rate, even without any actual approval or scrutiny by the agency. *Town of Norwood*, 202 F.3d at 419. And, as the Second Circuit did here, courts have come to apply the doctrine to bar suits in industries – such as title insurance – that are far-removed from the common carrier and public utility industries out of which the filed rate doctrine was born.

So be it. Petitioners do not seek to roll back any of these applications of the filed rate doctrine. As this Court recognized in its own struggle with the doctrine, "it is more important that the applicable rule of law be settled than that it be settled right." *Square D*, 476 U.S. at 424 (internal quotation marks and citation omitted). But the need to abide by precedent in no way sanctions *further expanding* the scope of the filed rate doctrine into new territory, as the Second Circuit's decision below would do. On the contrary, these same principles should compel this Court to reaffirm its holding in *Trans Alaska*, which the Second Circuit utterly disregarded.

The need for reining in the filed rate doctrine here is particularly important given the Supreme Court's

strict directive to allow repeals of the antitrust laws only when necessary to prevent a direct clash with agency regulation. See *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 372 (1973) (repeals "strongly disfavored" and allowed only where "plain repugnancy between the antitrust and regulatory provisions" exists) (quoting *United States* v. *Phila. Nat'l Bank*, 374 U.S. 321, 350-51 (1963)). The risk of ignoring this command and overextending the doctrine is that it "may give a host of state regulatory agencies broad power to grant exemptions from an important federal law for reasons wholly unrelated either to federal policy or even to any necessary significant state interest." *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 603 (1976).

That is exactly what will happen if the Second Circuit's decision stands. Respondents will be free to continue – outside *both* regulatory and judicial scrutiny – their collective rate-setting of title insurance fees that include prohibited and unauthorized costs. Neither the federal policy of antitrust enforcement, nor the state interest of ensuring reasonable title rates, would be served. Indeed, they would be flatly undermined. Applying the filed rate doctrine under these circumstances would surely "stretch the doctrine so far as to make it snap." WILLIAM C. HOLMES, ANTITRUST LAW HANDBOOK § 8:6 (2007).

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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July 6, 2010

APPENDICES

APPENDIX TABLE OF CONTENTS

Page

APPENDIX A - *Dolan* v. *Fid. Nat'l Title Ins. Co.*, No. 09-2697-cv, 2010 WL 457318 (2d Cir. Feb. 11, 2010) 1a

APPENDIX B - *Dolan* v. *Fid. Nat'l Title Ins. Co.*, No. 08-CV-00466(TCP)(WDW), 2009 WL 3934153 (E.D.N.Y. June 17, 2009) 11a

APPENDIX C - *Dolan* v. *Fid. Nat'l Title Ins. Co.*, No. 09-2697-cv (2d Cir. Apr. 7, 2010) 18a

APPENDIX D - N.Y. Ins. Law § 2101 (McKinney 2009) 20a

APPENDIX E - N.Y. Ins. Law § 2301 (McKinney 2009) 39a

APPENDIX F - N.Y. Ins. Law § 2303 (McKinney 2009) 40a

APPENDIX G - N.Y. Ins. Law § 2304 (McKinney 2009) 41a

APPENDIX H - N.Y. Ins. Law § 2305 (McKinney 2009) 46a

APPENDIX I - N.Y. Ins. Law § 2306 (McKinney 2009) 51a

APPENDIX J - N.Y. Ins. Law § 2315 (McKinney 2009) 52a

APPENDIX K - N.Y. Ins. Law § 6401 *et seq.* (McKinney 2009) 55a

APPENDIX L - Complaint, *Dolan* v. *Fid. Nat'l Title Ins. Co.*, No. 08-CV-00466(TCP) (WDW) (E.D.N.Y. filed July 11, 2008) 77a

APPENDIX M - N.Y. STATE INS. DEP'T TITLE INS. MEM. DECISION & OPINION (Nov. 19, 1991) 118a

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 09-2697-cv

BRENDAN DOLAN, BRIAN MCHALE, JONATHAN RAPAPORT, THOMAS PERRY, MBSF ALABAMA LLC, JOSEPH RAGUSA, KRISTIN RAGUSA, MARSHALL COOK, DOUGLAS BROWN, REBECCA BROWN, ALEX WINTNER, TUTTNAUER USA CO., LTD., LAWRENCE FISHER, RIGOBERTO CAPELLAN, VALERIO GONZALEZ, MARIA ELENA OCHOA, LENNY GONZALEZ, CHRISTOPHER P. AJEMIAN, SARA JULI, VINCENT BARBIERI, TERESA TANNAZZO BARBIERI, MICHAEL LOLLO, MEAGHAN LOBO, BRANDON RAYMAR, MELINDA RAYMAR, JOHN SHERIDAN,

Plaintiffs-Appellants,

v.

FIDELITY NATIONAL TITLE INSURANCE COMPANY, CHICAGO TITLE INSURANCE COMPANY, TICOR TITLE INSURANCE COMPANY, FIDELITY NATIONAL FINANCIAL, INC., FIRST AMERICAN TITLE INSURANCE COMPANY OF NEW YORK, UNITED GENERAL TITLE INSURANCE COMPANY, FIRST AMERICAN CORPORATION, COMMONWEALTH LAND TITLE INSURANCE COMPANY, LAWYERS TITLE INSURANCE CORPORATION, LANDAMERICA FINANCIAL GROUP, INC., STEWART TITLE INSURANCE COMPANY, MONROE TITLE INSURANCE COMPANY, STEWART INFORMATION SERVICES CORPORATION, TITLE INSURANCE RATE SERVICE ASSOCIATION, INC., STEWART TITLE GUARANTY COMPANY,

Defendants-Appellees.

Feb. 11, 2010

Present: GUIDO CALABRESI, REENA RAGGI, Circuit Judges and JOHN G. KOELTL,* *District Judge.*

SUMMARY ORDER

*1 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment entered on June 17, 2009, is AFFIRMED.

Plaintiffs, members of a putative class of title insurance consumers, sued defendants, title insurance companies doing business in New York and the Title Insurance Rate Service Association, Inc. ("TIRSA"), alleging a price-fixing conspiracy proscribed by section 1 of the Sherman Act, 15 U.S.C. § 1, and deceptive business practices in violation of New York state law. The district court dismissed the action pursuant to the filed rate doctrine. *See Keogh v. Chicago & Nw. Ry. Co.*, 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183 (1922). We review the dismissal of a complaint *de novo*, accepting all factual allegations as true and drawing all reasonable inferences in plaintiffs' favor. *See Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 115 (2d Cir.2008). In doing so, we assume the parties' familiarity with the facts and record of prior proceedings, which we reference only as necessary to explain our decision to affirm.

1. *Filed Rate Doctrine*

The filed rate doctrine "holds that any 'filed rate'—that is, one approved by the governing regulatory agency—is per se reasonable and unassailable in

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* District Judge John G. Koeltl of the United States District Court for the Southern District of New York, sitting by designation.

judicial proceedings brought by ratepayers." *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 18 (2d Cir.1994); *see also* IA Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 247, at 413 (3d ed. 2006) ("The doctrine operates as a rule against collateral attack: once filed, a rate may not be collaterally attacked in the courts."). The doctrine serves two purposes: (1) it protects against discrimination in rates as between different ratepayers, and (2) it prevents courts from having to determine the reasonableness of rates, a task better suited to regulatory agencies. *See Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d at 19. Thus, "the doctrine is applied strictly to prevent a plaintiff from bringing a cause of action even in the face of apparent inequities whenever either the nondiscrimination strand or the nonjusticiability strand underlying the doctrine is implicated by the cause of action the plaintiff seeks to pursue." *Marcus v. AT & T Corp.*, 138 F.3d 46, 59 (2d Cir.1998).

2. *Plaintiffs' Arguments*

On appeal, plaintiffs do not dispute that the challenged title insurance rates are filed with the New York Insurance Department (the "Department") or that they are the only rates defendants may lawfully charge in New York. *See* N.Y. Ins. Law § 6409(b). Rather, they make five arguments as to why the filed rate doctrine should not apply to their suit. We consider, and reject, each argument in turn.

a. *Defective Filing*

Plaintiffs submit that the filed rate doctrine does not apply because the challenged rates were improperly filed. Relying on *Security Services, Inc. v. Kmart Corp.*, 511 U.S. 431, 441-42, 114 S.Ct. 1702, 128 L.Ed.2d 433 (1994), they contend that inclusion of alleged

commissions to title agents without specific disclosure rendered defendants' filings "incomplete," Appellants' Br. at 20. We disagree. *Security Services* held that rates filed with the Interstate Commerce Commission, which became "void as a matter of law" under that commission's regulations, 511 U.S. at 437, could not be enforced, *see id.* at 444. Even if plaintiffs could prove that defendants engaged in a scheme to pay commissions to title agents in violation of New York Insurance Law § 6409(d), we are directed to no statute or regulation voiding defendants' filed rates such that this suit may survive a motion to dismiss.

*2 New York Insurance Law § 6409(b) requires a title insurance company to file "its rate manual, if any, its basic schedule of rates and classification of risks, its rating plan and rules in connection with the writing or issuance of policies of title insurance and . . . thereafter . . . any changes therein." Plaintiffs do not allege defendants' failure to file this information. To the extent the Department required more information to review the rates, the superintendent had the authority to request such information, *see id.* § 2305(d), and did not do so here. Nor can plaintiffs point to any disclosure obligation in the statutory proscription of commissions to title agents. *See id.* § 6409(d) ("No title insurance corporation . . . shall make any rebate . . . or give to any applicant for insurance, or to any person, firm, or corporation acting as agent . . . any commission, any part of its fees or charges, or any other consideration or valuable thing, as an inducement for, or as compensation for, any title insurance business."). Section 6409(d) does not reference any filed rate and, therefore, cannot be construed, by itself, to void even those rates high enough to cover the cost of prohibited commissions.

b. *Supervisory Authority*

Plaintiffs next urge us to fill a "regulatory vacuum" created by the Department's alleged lack of authority over title agents. Appellants' Br. at 28. We decline that invitation. To the extent plaintiffs suggest that the filed rate doctrine should not apply because the Department has not adequately scrutinized the defendants' rates, the argument has no merit. It is well-established that the doctrine applies to all filed rates, not merely those rates investigated before their approval. *See Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 417 & n. 19, 106 S.Ct. 1922, 90 L.Ed.2d 413 (1986). Further, we are skeptical that any relevant regulatory gap exists. While title insurance agents are excluded from the definition of "insurance agent" in New York Insurance Law § 2101(a)(4), the Department clearly has authority over title insurance rates, *see id.* § 6409(b). This case tangentially involves the former, but it directly contests the latter. Finally, the nonjusticiability policy underlying the filed rate doctrine reflects not only the court's respect for the judgment and expertise of regulators charged with approving rates, but also its "historical antipathy to rate setting by courts." *Arsberry v. Illinois*, 244 F.3d 558, 562 (7th Cir.2001) (Posner, J.); *see also Wegoland, Ltd. v. NYNEX Corp.*, 27 F.3d at 19. Even if we were to conclude that the Department lacked the expertise to determine the portion of title insurance rates attributable to alleged illegal commissions, we would be no more competent than the Department to set title insurance rates, especially when, as here, the agency is charged with balancing a variety of statutory factors to determine their reasonableness. *See* N.Y. Ins. Law § 2303.

c. *Enforcement of Filing Requirements*

*3 Plaintiffs next contend that they do not seek to alter filed rates but rather to enforce requirements of New York Insurance Law. We are not persuaded. In *Reiter v. Cooper*, a case brought under the Interstate Commerce Act ("ICA") involving freight rates, the Supreme Court held that the filed rate doctrine "assuredly does not preclude avoidance of the tariff rate . . . through claims and defenses that are specifically accorded by the ICA itself." 507 U.S. 258, 266, 113 S.Ct. 1213, 122 L.Ed.2d 604 (1993) (emphasis in original). So, while *Reiter* did not endorse an "unreasonable rate defense" based on general language that a carrier's rates must be "reasonable," *id.* (discussing 49 U.S.C. § 10701(a)), it did allow shippers to "assert[ ] . . . the reparations rights explicitly conferred by" the statute, *id.; see also* id. at 262-63 & n. 1 (noting that then—current 49 U.S.C. § 11705(b)(3) provided that "[a] common carrier . . . is liable for damages resulting from the imposition of rates for transportation or service the Commission finds to be in violation of this subtitle").[1]

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[1] Our sister circuits have applied similar reasoning to the Federal Telecommunications Act of 1996 ("1996 Act"). *See TON Servs., Inc. v. Qwest Corp.*, 493 F.3d 1225, 1236-38 (10th Cir.2007); *Davel Commc'ns, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1084-86 (9th Cir.2006). The 1996 Act makes a "common carrier . . . liable to the person or persons injured . . . for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter," 47 U.S.C. § 206, and expressly provides that "[a]ny person claiming to be damaged by any common carrier . . . may bring suit for the recovery of the damages . . . in any district court," *id.* § 207; *see also Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 52-55, 127 S.Ct. 1513, 167 L.Ed.2d 422 (2007) (holding that § 207 confers private right of action). Indeed, in concluding that "the

We cannot conclude that New York Insurance Law gives plaintiffs a similar right to attack the challenged filed rates based on defendants' alleged payment of commissions in violation of § 6409(d). That subsection bans the payment of commissions, but it does not confer on plaintiffs a private right of action. *Cf. id.* at 266 (noting that statute provided "claims and defenses"). To the contrary, § 6409(d) expressly provides that the remedy for any violation is a fine. *See* N.Y. Ins. Law § 6409(d) ("Any person or entity who accepts or receives such a commission or rebate shall be subject to a penalty equal to the greater of one thousand dollars or five times the amount thereof."). Section 6409(b), thus, hardly permits plaintiffs to enforce the statutory ban on title agent commissions through an antitrust challenge to title insurance rates set by the Department.

d. *Application to New York Title Insurance*

Plaintiffs next argue that there is a "serious question as to whether the [filed rate] doctrine should ever be applied to New York's title insurance system" because, they contend, New York title insurance regulation is not sufficiently "pervasive" and "comprehensive." Appellants' Br. at 33-34. We disagree. This court has held that the doctrine applies to "any 'filed rate,' "*Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d at 18, including rates filed with state agencies, *see id.* at 20. Here, New York title insurance rates are filed with the Department. Moreover, we have said that the

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filed-tariff doctrine does not bar a suit to enforce a command of the very regulatory statute giving rise to the tariff-filing requirement," the Court of Appeals for the Ninth Circuit twice referenced the 1996 Act's private right of action. *Davel Commc'ns, Inc. v. Qwest Corp.*, 460 F.3d at 1085 & n. 3. No similar private right exists here.

doctrine applies "whenever either the nondiscrimination strand or the nonjusticiability strand underlying [it] is implicated by the cause of action the plaintiff seeks to pursue." *Marcus v. AT & T Corp.*, 138 F.3d at 59. Plaintiffs' request "to strip from the rates all prohibited and otherwise unauthorized costs," Appellants' Br. at 32, effectively asks this court to set New York title insurance rates. It is clear that the filed rate doctrine forbids us from doing so. *See, e. g., Wegoland v. NYNEX Corp.*, 27 F.3d at 19. Finally, our conclusion that the filed rate doctrine applies here is consistent with other cases applying the doctrine to New York insurance rates. *See Fersco v. Empire Blue Cross/Blue Shield of N.Y.*, No. 93 Civ. 4226, 1994 WL 445730, at *2-3 (S.D.N.Y. Aug.17, 1994); *City of New York v. Aetna Cas. & Sur. Co.*, 264 A.D.2d 304, 693 N.Y.S.2d 139 (1st Dep't 1999); *Byan v. Prudential Ins. Co. of Am.*, 242 A.D.2d 456, 662 N.Y.S.2d 44 (1st Dep't 1997); *Minihane v. Weissman*, 226 A.D.2d 152, 640 N.Y.S.2d 102 (1st Dep't 1996). Plaintiffs point to no case holding otherwise.[2]

c. *Injunctive Relief*

*4 Plaintiffs finally submit that the district court erred in dismissing their claim for injunctive relief. For the filed rate doctrine to apply, "the antitrust

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[2] Plaintiffs cite cases declining to apply the filed rate doctrine in challenges to title insurance kickbacks under the federal Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601 *et seq. See Alexander v. Wash. Mut., Inc.*, No. 07-4426, 2008 WL 2600323, at *2-3 (E.D.Pa. June 30, 2008); *Blaylock v. First Am. Title Ins. Co.*, 504 F.Supp.2d 1091, 1098-1103 (W.D.Wash.2007); *see also Alston v. Countrywide Fin. Corp.*, 585 F.3d 753, 763-65 (3d Cir.2009). These cases are inapposite because RESPA provides both an independent right, *see* 12 U.S.C. § 2607(a), and a remedy, *see id.* § 2607(d)(2), which plaintiffs do not invoke here.

action must be against the rate itself, not against an underlying conspiracy that may have produced the rate." IA Areeda & Hovenkamp, *supra*, ¶ 247, at 414. Thus, a plaintiff may sue for an "injunction designed to put an end to the conspiracy," so long as that injunction does "not enjoin operation under established rates." *Georgia v. Pa. R.R.*, 324 U.S. 439, 455, 65 S.Ct. 716, 89 L.Ed. 1051 (1945); *see also id.* (observing that Georgia did not "seek to have any tariff provision cancelled"). In considering whether claims for injunctive relief are barred by the filed rate doctrine, this court has asked "whether an award of injunctive relief would implicate the nondiscrimination or the nonjusticiability strand of the filed rate doctrine," and has awarded injunctive relief when "the filed rate would remain unchanged." *Marcus v. AT & T Corp.*, 138 F.3d at 62.

Applying these principles to plaintiffs' requested injunction, we conclude that the filed rate doctrine is implicated. Plaintiffs ask the court to enjoin the following:

> defendants' concerted efforts and agreement to (i) collectively fix New York title insurance rates, (ii) include in their calculated rates agency commission costs, (iii) embed within these costs kickbacks and other illegal and unauthorized charges, and (iv) hide these supposed costs from regulatory scrutiny by funneling them to and through title agents.

Appellants' Br. at 39. An injunction to remove particular costs from filed rates is exactly the sort of relief the doctrine bars. Although plaintiffs artfully characterize the requested injunction as one to prohibit "concerted efforts," that does not permit their claim to escape application of the filed rate doctrine. Plain-

tiffs' proposed injunction does not seek to invalidate the New York law allowing insurers to discharge their filing obligations by using a designated rate service organization. *See* N.Y. Ins. Law § 2306. Nor does it reference New York's statutory policy "to authorize and regulate cooperative action among insurers." *Id.* § 2301.[3] Plaintiffs merely seek lower title insurance rates, and those rates must be set by the Department, not this court.

We have considered plaintiffs' other arguments on appeal and conclude that they lack merit. Accordingly, we AFFIRM the judgment of the district court.

C.A.2 (N.Y.), 2010.
Dolan v. Fidelity Nat. Title Ins. Co.
Slip Copy, 2010 WL 457318 (C.A.2 (N.Y.)), 2010-11 Trade Cases P 76,904

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[3] In *Georgia v. Pennsylvania Railroad*, the Supreme Court noted that the proposed injunction did not require the Court "to trench on the domain of the Commission." 324 U.S. at 461. The only concerted action plaintiffs plead here is defendants' membership in TIRSA, a licensed rate service organization. Thus, an injunction against defendants' alleged "concerted efforts," by itself, would disrupt the Department's jurisdiction over rate service organizations in a manner not contemplated by *Georgia*. *Compare id.* at 456 (noting that Congress did not exempt carriers from antitrust laws or grant agency authority to control or supervise collective rate-setting), *with* N.Y. Ins. Law §§ 2306 (permitting insurers to file rates through rate service organizations), 2313 (granting authority to license and regulate such organizations), 2320-21 (granting enforcement authority over such organizations).

APPENDIX B

UNITED STATES DISTRICT COURT
E.D. NEW YORK

No. 08-CV-00466 (TCP)(WDW)

DOLAN, *et al.*,

Plaintiff,

v.

FIDELITY NATIONAL TITLE INS. CO., *et al.*,

Defendants.

June 17, 2009.

MEMORANDUM AND ORDER

PLATT, *District Judge.*

*1 Before the Court is Defendants' Joint Motion To Dismiss the Consolidated Class Action Complaint with prejudice for failure to state a claim, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

For the following reasons, the Defendants' motion is GRANTED.

BACKGROUND

Plaintiffs, Brendan Dolan, et al. ("Plaintiffs") allege in this class action lawsuit that defendants, Fidelity National Title Insurance Co., et al. ("defendants") participated in an illegal price-fixing conspiracy in violation of the Sherman Act and New York General Business Law § 349 ("GBL § 349"). They argue that the defendants have been unjustly enriched by the

setting of artificially high insurance rates. Plaintiffs seek injunctive relief and damages.

The New York State Insurance Department (the "Insurance Department") is the regulatory agency given authority to review and approve title insurance rates in the state of New York. In order for the Insurance Department to complete the task of ensuring reasonable insurance rates, New York law requires that title insurance companies file their rates with the Superintendent of the Insurance Department. N.Y. Ins. Law § 2305(b). New York law further provides that title insurance companies, such as the defendants, may "discharge the rate filing obligation" by using "rates and rate information prepared by a designated rate service organization." N .Y. Ins. Law § 2306. Defendants have discharged their rate filing obligation by maintaining membership in the Title Insurance Rate Service Association, Inc. ("TIRSA"), which is also a defendant in this case. TIRSA submits information to the Insurance Department on behalf of the title insurer-members regarding existing insurance rates and also recommends changes to those rates. TIRSA must accompany its rate proposals with "information upon which the insurer supports the rate." N.Y. Ins. Law § 2305(c). The Insurance Department ultimately reviews, approves and sets the rates that it deems reasonable, not "excessive, inadequate or unfairly discriminatory." N.Y. Ins. Law § 2301. Title insurance companies are prohibited from charging any insurance rate unless and until that rate has been filed and approved by the Insurance Department. N.Y. Ins. Law § 2305(b).

TIRSA has made three title insurance rate-increase proposals in the past seventeen years. The first proposal was made in March of 1993. After

conducting a comprehensive analysis of the title insurance industry, the Insurance Department denied TIRSA's title insurance base-rate-increase proposal even though the base rate had not changed in nearly a decade. The next time TIRSA requested a revision of the base rates from the Insurance Department was in November of 1995. The Insurance Department approved a base rate increase of 6% after TIRSA reduced the percentage increase that the insurers had originally sought and after TIRSA produced the appropriate information in support of the request. TIRSA's latest rate filing occurred in September of 2001. Once again, the Insurance Department approved the rate increase proposal after TIRSA provided the department with sufficient justification for the increase. TIRSA has not requested a change in title insurance rates since 2001.

*2 Plaintiffs do not claim that the defendant title insurers charged rates different from those filed with and approved by the Insurance Department. Instead, Plaintiffs allege that the defendants conspired to set unreasonably high title insurance rates for the companies' own excessive gain and, consequently, violated Section 1 of the Sherman Act.

DISCUSSION

Defendants move for dismissal under Rule 12(b)(6) claiming that the filed rate doctrine precludes Plaintiffs claims. Under the filed rate doctrine, rates filed with a regulatory agency, such as the title insurance rates at issue are "per se reasonable and unassailable in judicial proceedings." *Wegoland, Ltd. v. NYNEX Corp.*, 806 F.Supp. 1112, 1115 (S.D.N.Y.1992), *aff'd*, 27 F.3d 17 (2d Cir.1994).

The filed rate doctrine, also known as the filed tariff doctrine, is a principle of federal and state law that recognizes the unsuitability of a court in determining "reasonable" rates, giving deference to regulatory agencies that have been designed by legislatures for the specific purpose of setting uniform rates. *Id.* The Supreme Court of the United States established the doctrine in the case of *Keogh v. Chicago & Northwestern Railway, Co.*, 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183 (1922). In Keogh, the Court affirmed the dismissal of a shipper's antitrust claim against interstate freight carriers, even though the carriers were allegedly conspiring to set artificially high tariff rates, because the Interstate Commerce Commission had previously approved the rates as being "reasonable and nondiscriminatory." *Id.* at 162. Under the doctrine, any rates filed with and approved by a regulatory agency are "per se reasonable and unassailable in judicial proceedings brought by ratepayers." *Wegoland*, 27 F.3d at 18. Application of the doctrine requires only that the rates be filed with the appropriate regulatory agency. *See Square D Co. v. Niagara Frontier Tarrif Bureau, Inc.*, 476 U.S. 409, 417, 106 S.Ct. 1922, 90 L.Ed.2d 413 (1986). When a regulated entity has filed rates with a federal or state agency, the doctrine bars any claim that challenges the rates as unreasonable or unlawful. *County of Suffolk v. Long Island Power Auth.*, 154 F.Supp.2d 380, 85 (E.D.N.Y.2000), *aff'd*, 11 Fed.App. 24 (2d Cir.2001).

Two policy principles underlie the filed rate doctrine. First, the doctrine serves to ensure that courts do not "substitute [their] judgment as to reasonable rates for that of an agency with specialized knowledge of the area." *County of Suffolk*, 154 F.Supp.2d at 385. This principle pertains to the "justiciabilty" of determining reasonable rates; the Second Circuit has explained

that, "Courts are simply ill-suited to systematically second guess the regulators' decisions . . ." *Wegoland*, 27 F.3d at 21. Secondly, the filed rate doctrine prevents regulated companies from engaging in price discrimination between ratepayers. *Marcus v. AT & T Corp.*, 138 F.3d 46, 58 (2d Cir.1998). If courts were able to award damages according to their assessment of reasonable rates, plaintiffs would end up paying different rates than non-suing ratepayers. *See Wegoland*, 27 F.3d at 21. This is the exact price discrimination that the filed rate doctrine seeks to prevent.

*3 Fraud or other unlawful conduct by the defendant does not preclude the application or effect of the filed rate doctrine. *See generally Wegoland*, 27 F.3d at 20. A court does not consider "the culpability of the defendant's conduct or the possibility of inequitable results" when applying the doctrine. *Marcus*, 138 F.3d at 58. For example, Justice Brandeis writing for the Court in the *Keogh* decision, held that even if the Court were to assume that the rate-fixing conspiracy allegations against the defendants were true, the filed rate doctrine would still bar the plaintiff's claim since the tariff rates had been filed with the Interstate Commerce Commission. *See Keogh*, 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183. Similarly, in the case of *Maislin Indus. v. Primary Steel, Inc.*, 497 U.S. 116, 129, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990), Justice Brenan explained that the Supreme Court has never held that a carrier's "unreasonable practices" justifies preclusion of the filed rate doctrine. The *Wegoland* court reaffirmed the notion that there is no fraud exception to the filed rate doctrine that would save a suit from dismissal. *Wegoland*, 27 F.3d at 20. First, the court explained that allowing an exception for

fraud would be incompatible with the line of Supreme Court cases from *Keogh* to *Square D. Id.* at 21. Secondly, such an exception would be inconsistent with policy behind the filed rate doctrine; allowing a fraud exception would be the equivalent of a court deciding what rates are reasonable, which, in turn, would "unduly subvert the regulating agencies' authority and thereby undermine the stability of the system." *Id.*

Under Rule 12(b)(6), the Court must "accept all allegations in the complaint as true and draw all inferences in the moving party's favor." *Patel v. Contemporary Classics of Beverly Hills*, 259 F.3d 123, 126 (2d Cir.2001). The Court, however, need not give a presumption of truthfulness to legal conclusions couched as factual allegations. *United States v. Bonanno Organized Crim Family of La Cosa Nostra*, 879 F.2d 20, 27 (2d Cir.1989). As the Supreme Court recently held, when "the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court." *Bell Atlantic v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1966, 167 L.Ed.2d 929 (2007).

The title insurance rates filed by Defendant's unquestionably fall under the scope of the filed rate doctrine. The rates at issue were filed with the New York Department of Insurance before being charged. As discussed above, those rates are therefore *per se* reasonable, and therefore cannot be challenged in court. Plaintiffs do not contest that the filed rates were the only rates that Defendants were allowed to charge in New York, and that those rates were approved by the relevant regulatory agency. Nothing

more is required for the filed rate doctrine to apply. *Square D Co. v. Niagra Frontier Tariff Bureau, Inc.*, 760 F.2d 1347, 1351 (2d Cir.1985). Even Plaintiffs' conclusory fraud allegations, which are not plead with specificity, do not vitiate the defense permitted by the filed rate doctrine. *Wegoland*, 27 F.3d at 20. The application of the filed rate doctrine is not "determined by the culpability of the defendants conduct or the possibility of inequitable results." *Marcus*, 138 F.3d at 58.

CONCLUSION

*4 For the reasons specified above, Defendant's motion to dismiss Plaintiffs' claims with prejudice is GRANTED.

SO ORDERED.

E.D.N.Y., 2009.

Dolan v. Fidelity Nat. Title Ins. Co.

Slip Copy, 2009 WL 3934153 (E.D.N.Y.)

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 09-2697 -cv

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 7th day of April, two thousand ten.

BRENDAN DOLAN, BRIAN MCHALE, JONATHAN RAPAPORT, THOMAS PERRY, MBSF ALABAMA LLC, JOSEPH RAGUSA, KRISTIN RAGUSA, MARSHALL COOK, DOUGLAS BROWN, REBECCA BROWN, ALEX WINTNER, TUTTNAUER USA CO., LTD., LAWRENCE FISHER, RIGOBERTO CAPELLAN, VALERIO GONZALEZ, MARIA ELENA OCHOA, LENNY GONZALEZ, CHRISTOPHER P. AJEMIAN, SARA JULI, VINCENT BARBIERI, TERESA TANNAZZO BARBIERI, MICHAEL LOLLO, MEAGHAN LOBO, BRANDON RAYMAR, MELINDA RAYMAR, JOHN SHERIDAN,

Plaintiffs-Appellants,

v.

FIDELITY NATIONAL TITLE INSURANCE COMPANY, CHICAGO TITLE INSURANCE COMPANY, TICOR TITLE INSURANCE COMPANY, FIDELITY NATIONAL FINANCIAL, INC., FIRST AMERICAN TITLE INSURANCE COMPANY OF NEW YORK, UNITED GENERAL TITLE INSURANCE COMPANY, FIRST AMERICAN CORPORATION, COMMONWEALTH LAND TITLE INSURANCE COMPANY, LAWYERS

TITLE INSURANCE CORPORATION, LANDAMERICA FINANCIAL GROUP, INC., STEWART TITLE INSURANCE COMPANY, MONROE TITLE INSURANCE COMPANY, STEWART INFORMATION SERVICES CORPORATION, TITLE INSURANCE RATE SERVICE ASSOCIATION, INC., STEWART TITLE GUARANTY COMPANY,

Defendants-Appellees.

Brendan Dolan, Brian McHale, Jonathan Rapaport, Thomas Perry, MBSF Alabama LLC, Joseph Ragusa, Kristin Ragusa, Marshall Cook, Douglas Brown, RebeccaBrown, Alex Wintner, Tuttnauer USA Co., Ltd., Lawrence Fisher, Rigoberto Capellan, Valerio Gonzalez, Maria Elena Ochoa, Lenny Gonzalez, Christopher P. Ajemian, Sara Juli, Vincent Barbieri, Teresa Tannazzo Barbieri, Michael Lollo, Meaghan Lollo, Brandon Raymar, Melinda Raymar, John Sheridan having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk of Court

/s/ Catherine O'Hagan Wolfe
Catherine O'Hagan Wolfe

[Stamp: United States Court of Appeals
Second Circuit
Filed Apr 07, 2010
Catherine O' Hagan Wolfe, Clerk]

APPENDIX D

McKinney's Consolidated Laws of New York Annotated
Insurance Law
Chapter 28. Of the Consolidated Laws
Article 21. Agents, Brokers, Adjusters,
Consultants and Intermediaries

§ 2101. Definitions

(a) In this article, "insurance agent" means any authorized or acknowledged agent of an insurer, fraternal benefit society or health maintenance organization issued a certificate of authority pursuant to article forty-four of the public health law, and any sub-agent or other representative of such an agent, who acts as such in the solicitation of, negotiation for, or sale of, an insurance, health maintenance organization or annuity contract, other than as a licensed insurance broker, except that such term shall not include:

(1) any regular salaried officer or employee of a licensed insurer, fraternal benefit society or health maintenance organization or of a licensed insurance agent, who does not solicit or accept from the public, outside of an office of such insurer, health maintenance organization or agent, applications or orders for any such contract, if such officer or employee does not receive a commission or other compensation for his services which commission or other compensation is directly dependent upon the amount of business done;

(2) employees of insurers, fraternal benefit societies or health maintenance organizations or organizations employed by insurers, fraternal benefit societies or health maintenance organizations who are engaging in the inspection, rating or classification of risks, or in the supervision of the training of

licensed insurance producers and who are not individually engaged in the sale, solicitation or negotiation of insurance;

(3) any agent or representative of a fraternal benefit society, other than agents representing societies governed by section four thousand five hundred twenty-seven of this chapter, who devotes, or intends to devote, less than fifty percent of the person's time to the solicitation and negotiation or sale of insurance contracts for fraternal benefit societies and who receives or intends to receive any commission or other compensation directly dependent on the amount of insurance, provided that any person who in the preceding calendar year has solicited, negotiated or sold any of the following contracts of insurance on behalf of a fraternal benefit society is presumed to have devoted, or intended to devote, fifty percent of the person's time to the solicitation, negotiation and sale of insurance contracts;

(A) life insurance contracts that, in the aggregate, exceed two hundred thousand dollars of coverage for all lives insured for the preceding calendar year;

(B) a permanent life insurance contract offering more than ten thousand dollars of coverage on an individual life;

(C) a term life insurance contract offering more than fifty thousand dollars of coverage on an individual life;

(D) any insurance contracts other than life that the fraternal benefit society may write that insure the individual lives of more than twenty-five persons;

(E) any variable life insurance or variable annuity contract;

(4) any agent or other representative of any title insurance company;

(5) any service contract provider or any administrator or person designated by a service contract provider who in this state markets, sells, offers for sale, issues, makes, proposes to make or administer service contracts pursuant to article seventy-nine of this chapter;

(6) a person who secures and furnishes information for the purpose of group life insurance, group property/casualty insurance, group annuities, group or blanket accident and health insurance; or for the purpose of enrolling individuals under plans, issuing certificates under plans or otherwise assisting in administering plans; or performing administrative services related to mass marketed property/casualty insurance, provided that no commission is paid to the person for the service;

(7) an employer or association or its officers, directors, employees, or the trustees of an employee trust plan, to the extent that the employers, officers, employees, directors or trustees are engaged in the administration or operation of a program of employee benefits for the employer's or association's own employees or the employees of its subsidiaries or affiliates, which program involves the use of insurance issued by an insurer, fraternal benefit society or health maintenance organization, as long as the employers, associations, officers, directors, employees or trustees are not in any manner compensated, directly or indirectly, by the company issuing the contracts;

(8) a person whose activities in this state are limited to advertising without the intent to solicit insurance in this state through communications in printed publications or other forms of electronic mass media whose distribution is not limited to residents of the state, provided that the person does not sell, solicit or negotiate insurance that would insure risks residing, located or to be performed in this state;

(9) a person who is not a resident of this state who sells, solicits or negotiates a contract of insurance for commercial property/casualty risks to an insured with risks located in more than one state insured under that contract, provided that such person is otherwise licensed as an insurance producer to sell, solicit or negotiate that insurance in the state where the insured maintains its principal place of business and the contract of insurance insures risks located in that state; or

(10) any salaried full-time employee who counsels or advises his or her employer relative to the insurance interests of the employer or of the subsidiaries or business affiliates of the employer provided that the employee does not sell or solicit insurance or receive a commission.

(b) In this article, "independent insurance agent" means an "insurance agent" who is not owned or controlled by any insurer, fraternal benefit society or health maintenance organization or group of such insurers and whose agency agreement does not prohibit the representation of other insurers or groups of insurers and which provides that upon termination of the agreement the agent's records and use and control of expirations remain the property of the agent. Only an "independent insurance agent" shall be represented

to the public as an independent insurance agent or agency.

(c) In this article, "insurance broker" means any person, firm, association or corporation who or which for any compensation, commission or other thing of value acts or aids in any manner in soliciting, negotiating or selling, any insurance or annuity contract or in placing risks or taking out insurance, on behalf of an insured other than himself, herself or itself or on behalf of any licensed insurance broker, except that such term shall not include:

(1) any salaried full-time employee who counsels or advises his or her employer relative to the insurance interests of the employer or of the subsidiaries or business affiliates of the employer provided that the employee does not sell or solicit insurance or receive a commission;

(2) an officer, director or employee of a licensed insurance producer, provided that the officer, director or employee does not receive any commission on policies written or sold to insure risks residing, located or to be performed in this state and:

(A) the officer, director or employee's activities are executive, administrative, managerial, clerical or a combination of these, and are only indirectly related to the sale, solicitation or negotiation of insurance; or

(B) the officer, director or employee's function relates to underwriting, loss control, inspection or the processing, adjusting, investigating or settling of a claim on a contract of insurance; or

(C) the officer, director or employee is acting in the capacity of a special agent or agency supervisor assisting licensed insurance producers where the per-

son's activities are limited to providing technical advice and assistance to licensed insurance producers and do not include the sale, solicitation or negotiation of insurance;

(3) any foreign freight forwarder registered with the federal maritime commission or any custom house broker licensed by the United States treasury department, when such forwarder or broker negotiates, issues or delivers a certificate or other evidence of a contract of insurance under an open marine policy naming the forwarder or broker as the insured and covering exports or imports serviced by such forwarder or broker on behalf of others, provided that such forwarder or broker takes or receives no money or other thing of value when acting as hereinafter specified, from any insurer or representative thereof, unless the receipt of money or thing of value is authorized under this chapter;

(4) any service contract provider or any administrator or person designated by a service contract provider who in this state markets, sells, offers for sale, issues, makes, proposes to make or administers service contracts pursuant to article seventy-nine of this chapter;

(5) a person who secures and furnishes information for the purpose of group life insurance, group property/casualty insurance, group annuities, group or blanket accident and health insurance; or for the purpose of enrolling individuals under plans, issuing certificates under plans or otherwise assisting in administering plans; or performs administrative services related to mass marketed property/casualty insurance, where no commission is paid to the person for the service;

(6) an employer or association or its officers, directors, employees, or the trustees of an employee trust plan, to the extent that the employers, officers, employees, director or trustees are engaged in the administration or operation of a program of employee benefits for the employer's or association's own employees or the employees of its subsidiaries or affiliates, which program involves the use of insurance issued by an insurer, fraternal benefit society or health maintenance organization, as long as the employers, associations, officers, directors, employees or trustees are not in any manner compensated, directly or indirectly, by the company issuing the contracts;

(7) a person whose activities in this state are limited to advertising without the intent to solicit insurance in this state through communications in printed publications or other forms of electronic mass media whose distribution is not limited to residents of the state, provided that the person does not sell, solicit or negotiate insurance that would insure risks residing, located or to be performed in this state; or

(8) a person who is not a resident of this state who sells, solicits or negotiates a contract for commercial property/casualty risks to an insured with risks located in more than one state insured under that contract, provided that such person is otherwise licensed as an insurance producer to sell, solicit or negotiate that insurance in the state where the insured maintains its principal place of business and the contract of insurance insures risks located in that state.

(d) In this article, "non-resident insurance agent" means an individual who is a non-resident of this state and who is licensed or authorized to act as an

insurance agent in the state in which he resides, or in which he or the firm or association of which he is a member or employee, or the corporation of which he is an officer, director, or employee maintains an office as an insurance agent.

(e) In this article, "non-resident insurance broker", means an individual who is a non-resident of this state and who is licensed or authorized to act as an insurance broker in the state in which he resides, or in which he, or the firm or association of which he is a member or employee, or the corporation of which he is an officer, director or employee, maintains an office as an insurance broker.

(f) In this article, "reinsurance intermediary" means any person, firm, association or corporation who acts as broker in soliciting, negotiating or selling any reinsurance contract or binder, or acts as an agent in accepting any reinsurance contract or binder on behalf of an insurer, except that such term shall not include:

(1) licensed attorneys at law of this state acting in their professional capacity as such;

(2) regular salaried officers, employees or attorneys in fact of an authorized insurer or of an underwriting office of such insurer while acting in their capacity as such in discharging the duties of their employment or appointment;

(3) licensed insurance agents acting within the scope of their agency authority in the placement or acceptance of reinsurance on risks produced or managed by such agents; or

(4) licensed insurance brokers, in the placement of reinsurance on risks produced by such brokers.

(g) In this article, "adjuster" means any "independent adjuster" or "public adjuster" as defined below:

(1) The term "independent adjuster" means any person, firm, association or corporation who, or which, for money, commission or any other thing of value, acts in this state on behalf of an insurer in the work of investigating and adjusting claims arising under insurance contracts issued by such insurer and who performs such duties required by such insurer as are incidental to such claims and also includes any person who for compensation or anything of value investigates and adjusts claims on behalf of any independent adjuster, except that such term shall not include:

(A) any officer, director or regular salaried employee of an authorized insurer or entity licensed pursuant to article forty-four of the public health law providing comprehensive health service plans (as used in this paragraph, a "health maintenance organization"), or any manager thereof, individual or corporate, or the manager, agent or general agent of any department thereof, individual or corporate, or attorney in fact of any reciprocal insurer or Lloyds under-writer, or marine underwriting office, unless acting as an auto body repair estimator as defined in subsection (j) of this section;

(B) any officer, director or regular salaried employee of an insurer authorized to write accident and health insurance, a corporation licensed under article forty-three of this chapter (collectively, as used in this paragraph, a "health insurer") or a health maintenance organization, or any manager thereof, individual or corporate, when the claim to be adjusted is issued or administered by another health insurer or health maintenance organization within

the same holding company system as the health insurer or health maintenance organization adjusting the claim;

(C) any officer, director or regular salaried employee of an article fifteen holding company or a controlled person within such holding company system providing administrative services within that holding company, or any manager thereof, individual or corporate, when the claim to be adjusted is submitted for payment under a health benefit plan that is issued or administered by a health insurer or health maintenance organization within that same holding company system;

(D) any officer, director or regular salaried employee of an authorized insurer that is licensed to write the kind of insurance to be adjusted, or any manager thereof, individual or corporate, when the claim to be adjusted is pursuant to a policy that is issued or administered by another insurer within the same holding company system as the authorized insurer adjusting the claim, unless acting as an auto body repair estimator as defined in subsection (j) of this section;

(E) any officer, director or regular salaried employee of an authorized life insurance company, or any manager thereof, individual or corporate, or the manager, agent or general agent of any department thereof, individual or corporate, when the claim to be adjusted is submitted under an insurance contract issued by another insurer and the claim: (i) is within the scope of a contract of reinsurance between the two insurers for all of the underlying risks and none of the underlying risks are later reinsured back to the ceding insurer; and (ii) relates to a kind of insurance

that the authorized life insurance company adjusting the claim is licensed to write;

(F) any adjustment bureau or association owned and maintained by insurers to adjust or investigate losses, or any regular salaried employee or manager thereof who devotes substantially all of his time to the business of such bureau or association, unless acting as an auto body repair estimator as defined in sub-section (j) of this section;

(G) any licensed agent of an authorized insurer who adjusts losses for such insurer solely under policies issued through his or its agency, provided the agent receives no compensation for such services in excess of fifty dollars per loss adjusted;

(H) any licensed attorney at law of this state;

(I) any average adjuster or adjuster of maritime losses; or

(J) any agent or other representative of an insurer authorized to issue life and annuity contracts, provided he receives no compensation for such services.

(2) "Public adjuster" means any person, firm, association or corporation who, or which, for money, commission or any other thing of value, acts or aids in any manner on behalf of an insured in negotiating for, or effecting, the settlement of a claim or claims for loss or damage to property of the insured in this state caused by, or resulting from, any of the risks as enumerated in paragraphs four, five, six, seven, eight, nine and ten and subparagraphs (B) and (C) of paragraph twenty of subsection (a) of section one thousand one hundred thirteen of this chapter, not including loss or damage to persons under subpara-

graph (B) of paragraph twenty of subsection (a) of such section or who, or which, advertises for, or solicits employment as an adjuster of such claims, and shall also include any person who, for money, commission or any other thing of value, solicits, investigates, or adjusts such claims on behalf of any such public adjuster, except that such term shall not include:

(A) any employee, agent or other representative of any authorized insurer who acts as such in the adjustment of any claim or any licensed insurance broker who acts as an adjuster for a client of such broker, without any compensation for such services as adjuster if such insurer's representative or such licensed insurance broker does not advertise or publicly solicit the adjustment of claims in such a way as is likely to mislead the public into believing that he is offering his services as a public adjuster;

(B) any licensed attorney at law of this state who acts or aids in adjusting insurance claims as an incident to the practice of his profession and who does not advertise himself as a public adjuster;

(C) any licensed insurance broker who acts as an adjuster with respect to any loss involving insurance contracts under which he was the broker of record in placing the insurance, whether or not designated in writing to act for the insured; or

(D) any other licensed insurance broker who has been designated to act for the insured in writing before a loss occurs.

(h) In this chapter, "licensed insurance broker," means an insurance broker who is the licensee or a sub-licensee named in a license issued or renewed pursuant to the provisions of section two thousand

one hundred four of this article and in full force and effect.

(i) In this chapter, "limited licensee" shall mean a person authorized to sell certain coverages relating to the rental of motor vehicles pursuant to the provisions of section two thousand one hundred thirty-one of this article.

(j) In this article, "auto body repair estimator" means any officer, director or regular salaried employee of an authorized insurer or of any adjustment bureau or association owned and maintained by insurers, who writes, or who directly supervises the writing of, any motor vehicle body repair estimate in this state, on behalf of such insurer in the work of diagnosing or estimating motor vehicle repair costs or procedures relative to appraising, investigating or adjusting claims for motor vehicle body repair work pursuant to an insurance contract.

(k) In this article, "insurance producer" means an insurance agent, insurance broker, reinsurance intermediary, excess lines broker, or any other person required to be licensed under the laws of this state to sell, solicit or negotiate insurance. Such term shall not include:

(l) an officer, director or employee of a licensed insurer, fraternal benefit society or health maintenance organization or of a licensed insurance producer, provided that the officer, director or employee does not receive any commission on policies written or sold to insure risks residing, located or to be performed in this state and:

(A) the officer, director or employee's activities are executive, administrative, managerial, clerical or

a combination of these, and are only indirectly related to the sale, solicitation or negotiation of insurance; or

(B) the officer, director or employee's function relates to underwriting, loss control, inspection or the processing, adjusting, investigating or settling of a claim on a contract of insurance; or

(C) the officer, director or employee is acting in the capacity of a special agent or agency supervisor assisting licensed insurance producers where the person's activities are limited to providing technical advice and assistance to licensed insurance producers and do not include the sale, solicitation or negotiation of insurance;

(2) employees of insurers, fraternal benefit societies or health maintenance organizations or organizations employed by insurers, fraternal benefit societies or health maintenance organizations who are engaging in the inspection, rating or classification of risks, or in the supervision of the training of licensed insurance producers and who are not individually engaged in the sale, solicitation or negotiation of insurance;

(3) any agent or representative of a fraternal benefit society, other than agents representing societies governed by section four thousand five hundred twenty-seven of this chapter, who devotes, or intends to devote, less than fifty percent of the person's time to the solicitation, negotiation or sale of insurance contracts for fraternal benefit societies and who receives or intends to receive any commission or other compensation directly dependent on the amount of insurance, provided that any person who in the preceding calendar year has solicited, negotiated or sold any of the following contracts of insurance on

behalf of a fraternal benefit society is presumed to have devoted, or intended to devote, fifty percent of the person's time to the solicitation, negotiation or sale of insurance contracts:

(A) life insurance contracts that, in the aggregate, exceed two hundred thousand dollars of coverage for all lives insured for the preceding calendar year;

(B) a permanent life insurance contract offering more than ten thousand dollars of coverage on an individual life;

(C) a term life insurance contract offering more than fifty thousand dollars of coverage on an individual life;

(D) any insurance contracts other than life that the fraternal benefit society may write that insure the individual lives of more than twenty-five persons;

(E) any variable life insurance or variable annuity contract; or

(4) any agent or other representative of any title insurance company;

(5) any service contract provider or any administrator or person designated by a service contract provider who in this state markets, sells, offers for sale, issues, makes, proposes to make or administer service contracts pursuant to article seventy-nine of this chapter;

(6) a person who secures and furnishes information for the purpose of group life insurance, group property/casualty insurance, group annuities, group or blanket accident and health insurance; or for the purpose of enrolling individuals under plans, issuing

certificates under plans or otherwise assisting in administering plans; or performs administrative services related to mass marketed property/casualty insurance, where no commission is paid to the person for the service;

(7) an employer or association or its officers, directors, employees, or the trustees of an employee trust plan, to the extent that the employers, officers, employees, directors or trustees are engaged in the administration or operation of a program of employee benefits for the employer's or association's own employees or the employees of its subsidiaries or affiliates, which program involves the use of insurance issued by an insurer, fraternal benefit society or health maintenance organization, as long as the employers, associations, officers, directors, employees or trustees are not in any manner compensated, directly or indirectly, by the company issuing the contracts;

(8) a person whose activities in this state are limited to advertising without the intent to solicit insurance in this state through communications in printed publications or other forms of electronic mass media whose distribution is not limited to residents of the state, provided that the person does not sell, solicit or negotiate insurance that would insure risks residing, located or to be performed in this state;

(9) a person who is not a resident of this state who sells, solicits or negotiates a contract of insurance for commercial property/casualty risks to an insured with risks located in more than one state insured under that contract, provided that such person is otherwise licensed as an insurance producer to sell, solicit or negotiate that insurance in the state where the insured maintains its principal place of business

and the contract of insurance insures risks located in that state; or

(10) any salaried full-time employee who counsels or advises his or her employer relative to the insurance interests of the employer or of the subsidiaries or business affiliates of the employer, provided that the employee does not sell or solicit insurance or receive a commission.

(l) In this article, "home state" means the District of Columbia or any state or territory of the United States in which an insurance producer maintains his, her or its principal place of residence or principal place of business and is licensed to act as an insurance producer.

(m) In this article, "negotiate" or "negotiation" means the act of conferring directly with or offering advice directly to a purchaser or prospective purchaser of a particular contract of insurance concerning any of the substantive benefits, terms or conditions of the contract, provided that the person engaged in that act either sells insurance or obtains insurance from licensed insurers, fraternal benefit societies or health maintenance organizations for purchasers.

(n) In this article, "sell" or "sale" means to exchange a contract of insurance by any means, for money or its equivalent, on behalf of a licensed insurer, fraternal benefit society or health maintenance organization.

(o) In this article, "solicit" or "solicitation" means attempting to sell insurance or asking or urging a person to apply for a particular kind of insurance from a particular licensed insurer, fraternal benefit society or health maintenance organization.

(p) In this article, "business entity" means a corporation, association, partnership, limited liability company, limited liability partnership or other legal entity.

(q) In this article, "person" means an individual or a business entity.

(r) In this article, "line of authority" means any of the following:

(1) life: insurance coverage on human lives including benefits of endowment and annuities, and may include benefits in the event of death or dismemberment by accident and benefits for disability income;

(2) accident and health or sickness: insurance coverage for sickness, bodily injury or accidental death and may include benefits for disability income;

(3) property: insurance coverage for the direct or consequential loss or damage to property of every kind;

(4) casualty: insurance coverage against legal liability, including that for death, injury or disability or damage to real or personal property;

(5) variable life and variable annuity products: insurance coverage provided under variable life insurance contracts and variable annuities;

(6) personal lines: property/casualty insurance coverage sold to individuals and families for primarily noncommercial purposes; and

(7) any other line of insurance permitted pursuant to this chapter.

(s) In this article, "controlled person" shall have the meaning set forth in paragraph five of subsection

(a) of section one thousand five hundred one of this chapter.

(t) In this article, "holding company" shall have the meaning set forth in paragraph three of subsection (a) of section one thousand five hundred one of this chapter.

(u) In this article, "holding company system" shall have the meaning set forth in paragraph six of subsection (a) of section one thousand five hundred one of this chapter.

APPENDIX E

McKinney's Consolidated Laws of New York Annotated
Insurance Law
Chapter 28. Of the Consolidated Laws
Article 23. Property/Casualty Insurance Rates

§ 2301. Purpose

The purpose of this article is to promote the public welfare by regulating insurance rates to the end that they not be excessive, inadequate or unfairly discriminatory, to promote price competition and competitive behavior among insurers, to provide rates that are responsive to competitive market conditions, to improve the availability and reliability of insurance and to authorize and regulate cooperative action among insurers within the scope of this article.

APPENDIX F

McKinney's Consolidated Laws of New York Annotated
Insurance Law
Chapter 28. Of the Consolidated Laws
Article 23. Property/Casualty Insurance Rates

§ 2303. Standards for rates

Rates shall not be excessive, inadequate, unfairly discriminatory, destructive of competition or detrimental to the solvency of insurers. In determining whether rates comply with the foregoing standards, the superintendent shall include all income earned by such insurer and any insurer controlling or controlled by such insurer or under common control by or with such insurer on all its investments of any kind and wherever located. The superintendent shall further determine whether any component of such rates represent an effort on the part of the insurer to recover losses incurred in another state due to any referendum, law or regulation which requires a general reduction in rates for the kinds of insurance described in section two thousand three hundred two of this article. Such a finding shall be deemed unfairly discriminatory for the purposes of this article.

APPENDIX G

McKinney's Consolidated Laws of New York Annotated
Insurance Law
Chapter 28. Of the Consolidated Laws
Article 23. Property/Casualty Insurance Rates

§ 2304. Rate making and supporting information

(a) In the making of rates, consideration shall be given to past and prospective loss experience, including the conflagration and catastrophe hazards, if any, both within and without this state, to all factors reasonably attributable to the class of risks, to a reasonable profit, to past and prospective expenses both country-wide and those specially applicable to this state, and in the case of participating insurers to policyholders' dividends, savings or unabsorbed premium deposits allowed or returned to policyholders, members or subscribers.

(b) The information furnished in support of a filing may include:

(1) the experience or judgment of the insurer or rate service organization making the rate;

(2) its interpretation of any statistical data it relies upon;

(3) the experience of other insurers or rate service organizations; or

(4) any other relevant factors.

(c) Risks may be grouped by classifications for the establishment of rates and minimum premiums. Classification rates may be modified to produce rates for individual risks in accordance with rating plans which establish standards for measuring variations in hazards or expense provisions, or both. Such stan-

dards may measure any differences among risks that can be demonstrated to have a probable effect upon losses or expenses.

(d) The systems of expense provisions included in the rates for use by any insurer or group of insurers may differ from those of other insurers or groups of insurers to reflect the requirements of the operating methods of any such insurer or group with respect to one or more kinds of insurance, or subdivisions of kinds of insurance, or classes of risks, or any part or combination of the foregoing, for which separate expense provisions are applicable.

(e)(1) Premiums for workers' compensation insurance for employments classified under sections two hundred twenty, two hundred forty and two hundred forty-one of the labor law, provided such employments are classified under each of said sections, shall be established on the basis of payroll and a formula which provides appropriate credits, provided such credits shall not apply to payroll in excess of the payroll limitation amount set forth in subdivision two of section eighty-nine of the workers' compensation law and this subsection. With the exception of employments engaged in the construction of one or two family residential housing, premiums shall be calculated in accordance with the following limitations:

(A) For policies with rating anniversary dates after September thirtieth, nineteen hundred ninety-nine and before October first, two thousand, an employer's payroll for premium computation purposes in the affected construction classifications shall be the actual weekly payroll per employee for the number of weeks employed subject to a maximum of nine hundred dollars per week per employee plus

one-half of the difference between the employer's total payroll and the limited payroll.

(B) For policies with rating anniversary dates after September thirtieth, two thousand and before October first, two thousand one, an employer's payroll for premium computation purposes in the affected construction classifications shall be the actual weekly payroll per employee for the number of weeks employed subject to a maximum of nine hundred dollars per week per employee.

(C) For policies with rating anniversary dates after September thirtieth, two thousand one and before October first, two thousand two, an employer's payroll for premium computation purposes in the affected construction classifications shall be the actual weekly payroll per employee for the number of weeks employed subject to a maximum of eight hundred dollars per week per employee.

(D) For policies with rating anniversary dates after September thirtieth, two thousand two, an employer's payroll for premium computation purposes in the affected construction classifications shall be the actual weekly payroll per employee for the number of weeks employed subject to a maximum of the greater of seven hundred fifty dollars per week or the weekly payroll amount upon which the maximum weekly benefit is based, per employee.

(2) The loss costs applicable to employments classified under sections two hundred twenty, two hundred forty and two hundred forty-one of the labor law, provided such employments are classified under each of said sections, shall be adjusted to reflect the payroll limitations required by this section as they separately affect such rates for work actually

performed within each of the following geographic territories:

(A) Territory 1 comprising the counties of the Bronx, Kings, New York, Queens, and Richmond;

(B) Territory 2 comprising the counties of Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk and Westchester; and

(C) Territory 3 comprising all other counties within the state.

(f) The rate adjustments required by subsection (e) of this section shall be filed by the New York compensation insurance rating board in accordance with the provisions of section two thousand three hundred forty-seven of this article, and shall not become effective until approved by the superintendent.

(g) "Loss costs," for the purpose of workers' compensation insurance in this article, means that portion of a rate intended to represent the anticipated costs of claim payments and loss adjustment expenses associated with such claim payments, and may include one or more trend factors. Loss costs do not include provisions for expenses (other than loss adjustment expenses) such as acquisition costs, overhead and taxes, or profit. For all other purposes, the superintendent, except as otherwise provided in this chapter, may promulgate regulations defining loss costs.

(h) A loss cost filing shall be deemed to be a rate filing under this article.

(i) Nothing in this section shall prohibit the application of payroll limitation provisions at the discre-

tion of the superintendent, provided such programs were in effect prior to the effective date of this subsection.

APPENDIX H

McKinney's Consolidated Laws of New York Annotated
Insurance Law
Chapter 28. Of the Consolidated Laws
Article 23. Property/Casualty Insurance Rates

§ 2305. Rates or rating plans; no prior approval; prior approval

(a) [Eff. until after June 30, 2011. *See* subsec. (f), below.] Except as otherwise provided in subsection (b) hereof or section two thousand three hundred eight of this article, prior approval of rates, rating plans, rating rules and rate manuals by the superintendent shall not be required.

(b) rate filings for:

(1) workers' compensation insurance;

(2) motor vehicle insurance, or surety bonds, required by section three hundred seventy of the vehicle and traffic law;

(3) joint underwriting;

(4) motor vehicle assigned risk insurance;

(5) insurance issued by the New York Property Insurance Underwriting Association;

(6) risk sharing plans authorized by section two thousand three hundred eighteen of this article;

(7) title insurance;

(8) medical malpractice liability insurance;

(9) insurance issued by the Medical Malpractice Insurance Association;

(10) mortgage guaranty insurance;

(11) credit property insurance, as defined in section two thousand three hundred forty of this article; and

(12) gap insurance

(13) Private passenger automobile insurance, except as provided in section two thousand three hundred fifty of this article.

shall be filed with the superintendent and shall not become effective unless either the filing has been approved or thirty days, which the superintendent may with cause extend an additional thirty days and with further cause extend an additional fifteen days, have elapsed and the filing has not been disapproved as failing to meet the requirements of this article, including the standard that rates be not otherwise unreasonable. After a rate filing becomes effective, the filing and supporting information shall be open to public inspection. If a filing is disapproved, notice of such disapproval order shall be given, specifying in what respects such filing fails to meet the requirements of this article. Upon his or her request, the superintendent shall be provided with support and assistance from the workers' compensation board and other state agencies and departments with appropriate jurisdiction. The loss cost multiplier for each insurer providing coverage for workers' compensation, as defined by regulation promulgated by the superintendent, shall be promptly displayed on the department's website and updated in the event of any change.

(c) Rates filed with the superintendent shall be accompanied by the information upon which the insurer supports the rate as set forth in subsection

(b) of section two thousand three hundred four of this article.

(d) When a filing subject to subsection (b) hereof or to section two thousand three hundred forty-four of this article is not accompanied by the information upon which the insurer supports the filing and the superintendent does not have sufficient information to determine whether the filing meets the requirements of this article, the insurer shall be required to furnish such information and in such event the thirty, thirty or fifteen day period of subsection (b) hereof or subsection (d) of section two thousand three hundred forty-four shall commence as of the date such information is furnished.

(e) The superintendent: (1) by regulation may, in lieu of the waiting period set forth in subsection (b) of this section, require workers' compensation insurance rate filings to be specifically approved before they become effective; and (2) shall hold a public hearing if a rate service organization makes a loss cost filing for workers' compensation that is an increase of seven percent or more over the approved loss costs from the prior year. Until June second, two thousand thirteen, a rate service organization for workers' compensation shall make a loss cost filing every year on or before June first, or such earlier date as is set by the superintendent.

(f) Subsection (a) of this section shall be of no force or effect during the period August third, two thousand one through the day before the effective date of the property/casualty insurance availability act, and after June thirtieth, two thousand eleven. During the period August third, two thousand one through the day before the effective date of the property/casualty insurance availability act, and again

commencing on July first, two thousand eleven, all rates previously subject to subsection (a) of this section, other than rates which are not required to be filed pursuant to subsection (b) of section two thousand three hundred ten of this article or which have been suspended from the filing requirement pursuant to section two thousand three hundred eleven of this article, shall become subject to subsections (b), (c) and (d) of this section. All other provisions of this article applicable to kinds of insurance or insurance activities the rates for which are subject to prior approval under subsection (b) of this section shall apply to kinds of insurance the rates for which were previously subject to subsection (a) of this section or the rates for which are not required to be filed pursuant to subsection (b) of section two thousand three hundred ten of this article or the rates for which have been suspended from the filing requirement pursuant to section two thousand three hundred eleven of this article.

(g)(1) If all rates should become subject to the prior approval provisions of subsections (b), (c) and (d) hereof as set forth in subsection (f) hereof, rates for inland marine risks which by general custom of the business are not written according to manual rates or rating plans are not required to be filed unless the superintendent directs they be filed.

(2) Specific inland marine rates on risks specially rated by a rate service organization shall be filed and such rates and any special filing with respect to a surety or guaranty bond required by law or by court or executive order or by order, rule or regulation of a public body, not covered by a previous filing, shall become effective when filed and shall be deemed to meet the requirements of this article until

such time as the superintendent reviews the filing and disapproves it.

[(h) Repealed by L.2008, c. 11, § 8, eff. Feb. 1, 2008.]

APPENDIX I

McKinney's Consolidated Laws of New York Annotated
Insurance Law
Chapter 28. Of the Consolidated Laws
Article 23. Property/Casualty Insurance Rates

§ 2306. Delegation of rate filing obligation

An insurer or group of insurers may discharge the rate filing obligation required by subsections (b) and (c) of section two thousand three hundred five of this article by giving notice to the superintendent that it uses rates and rate information prepared by a designated rate service organization, with such information and modifications thereof as is necessary fully to inform the superintendent. The rate and rate information of such insurer or group of insurers shall be those filed from time to time by the rate service organization, including any amendments thereto as filed, subject, however, in the case of an insurer to the modifications filed by such insurer.

APPENDIX J

McKinney's Consolidated Laws of New York Annotated
Insurance Law
Chapter 28. Of the Consolidated Laws
Article 23. Property/Casualty Insurance Rates

§ 2315. Recording and reporting of experience; statistical plans

(a) Every authorized insurer shall annually file with the rate service organization of which it is a member or subscriber, or with such other agency as the superintendent may approve, a statistical report showing a classification schedule of its premiums and losses on all kinds or types of insurance business subject to this article, and such other information as the superintendent may deem necessary or expedient for the administration of the provisions of this article. The superintendent from time to time may prescribe the form of the report including statistical data conforming to established classifications. The statistical reports shall be consolidated in accordance with regulations prescribed by the superintendent. Such consolidations shall be made available, subject to reasonable rules promulgated by the superintendent, to insurers and rate service organizations. No insurer shall be required to record or report its loss experience on a classification basis that is inconsistent with the rating system filed by it, except that the superintendent may require each insurer writing private passenger automobile coverages to file annually with the superintendent (or a statistical agent designated by the superintendent for such purpose), in the form prescribed by the superintendent, a statistical report showing a schedule of its premiums, losses, and exposures classified by United States postal zip code. No statistical report shall be issued or other-

wise made available to any rate service organization (except in the capacity of designated statistical agent), insurers, or persons other than appropriate governmental entities, except on a consolidated manner, or in such aggregate form as to protect an individual insurer's schedule of premiums, losses and exposures for any specific zip code.

(b) Statistical plans and rules shall be promulgated for the recording and reporting of expense experience on a country-wide basis. Such rules and plans may also provide for the recording and reporting of expense experience items which are specially applicable to this state and are not susceptible of determination by a prorating of country-wide expense experience.

(c) In order to further uniform administration of rate regulatory laws, the superintendent and every insurer and rate service organization may exchange information and experience data with insurance supervisory officials, insurers, and rate service organizations in other states and may consult with them with respect to rate making and the application of rating systems. Reasonable rules and plans may be promulgated by the superintendent for the interchange of data necessary for the application of rating plans. In the promulgation of statistical plans and rules the superintendent shall give consideration to the rating systems on file with him and, in order that such rules and plans may be as uniform as is practicable among the several states, to the rules and to the form of the plans in other states.

(d) No plan, rule or regulation, or amendment thereto, shall be promulgated by the superintendent pursuant to subsection (a), (b) or (c) hereof except upon notice, and after hearing, to every rate service

organization affected thereby. No such plan, rule or regulation, or amendment thereto, shall become effective less than sixty days after promulgation.

(e) The willful withholding of information from, or giving of false or misleading information to, the compensation insurance rating board or any other rate service organization or any insurer or the superintendent or any statistical agency designated by the superintendent, which will in any way affect the rate or premium chargeable to any assured or group of assureds shall constitute a violation of this chapter and also be subjected to the penalty provided for in subsection (e) of section two thousand three hundred twenty-one of this article.

APPENDIX K

McKinney's Consolidated Laws of New York Annotated
Insurance Law
Chapter 28. Of the Consolidated Laws
Article 64. Title Insurance Corporations

§ 6401. Definitions

In this article, the following definitions apply except as otherwise specified:

(a) "Title insurance corporation" means a corporation exercising any of the powers described in paragraph one or two of subsection (b) of section six thousand four hundred three of this article.

(b) "Title insurance policy" means any policy or contract insuring or guaranteeing the owners of real property and chattels real and other persons interested therein, or having liens thereon, against loss by reason of encumbrances thereon and defective titles.

§ 6402. Organization; financial requirements

A title insurance corporation may be organized and licensed in the manner prescribed in subsection (e) of section one thousand one hundred two and section one thousand two hundred one of this chapter, except as hereinafter prescribed, to do the kind of insurance business, and with the incidental powers, specified in section six thousand four hundred three of this article, with a paid-in capital of at least five hundred thousand dollars and a paid-in initial surplus at least equal to fifty percent of its paid-in capital, and it shall at all times thereafter maintain a capital at least equal to five hundred thousand dollars, except that any such corporation organized before July first, nineteen hundred eighty-two, shall at all times maintain a minimum capital of two hundred fifty thou-

sand dollars. In the organization of any such corporation the provisions of section one thousand two hundred one of this chapter shall be superseded or supplemented by the following provisions:

(a) The duration of such corporation shall be perpetual.

(b) Its principal office shall be located in this state.

(c) The purposes for which such corporation shall be organized shall only be such as are specified in section six thousand four hundred three of this article.

(d) Its incorporators shall be natural persons, not less than seven in number, and shall possess the qualifications of directors prescribed in subsection (e) hereof.

(e) Its directors shall be natural persons, not less than seven in number, all citizens of the United States, a majority of whom shall be citizens and residents of this state at the time of their election and during their continuance in office.

(f) Before a license to do business shall be issued to such corporation a list of its shareholders shall be filed in the office of the superintendent, subscribed and affirmed as true under the penalties of perjury by two of its principal officers, giving the name, residence and post-office address of, and number of shares held by, each shareholder.

(g) No foreign or alien insurer shall be granted a license or renewal of a license to do in this state the kind of business specified in paragraph eighteen of subsection (a) of section one thousand one hundred thirteen of this chapter if it may exercise any powers or conduct any business without this state not autho-

rized by such paragraph, or unless its surplus to policyholders, of which not more than five percent of its admitted assets shall be represented by title plant or plants, is at the time of initial licensing not less than the sum of (i) the minimum capital and initial surplus required of a similar domestic insurer, and (ii) an amount by which reserves computed in accordance with paragraphs one and two of subsection (a) of section six thousand four hundred five of this article on business within and without the state exceed its reserves of a comparable nature, whether statutory or voluntary, and unless such insurer at all times thereafter maintains a surplus to policyholders, similarly limited as to value of title plant or plants, at least equal to the sum of such minimum capital and reserves determined as hereinabove set forth, or if it fails to meet any other requirements of this chapter applicable to a domestic title insurance corporation except that any such insurer initially licensed on or after July first, nineteen hundred eighty-two, shall have a surplus to policyholders at least equal to the sum of (i) minimum capital and initial surplus required of a like domestic insurer initially licensed on or after July first, nineteen hundred eighty-two, and (ii) reserves as hereinabove required; and shall maintain a surplus to policyholders at least equal to the sum of (i) the reserves hereinabove required and (ii) the minimum capital required of a domestic insurer initially licensed on or after July first, nineteen hundred eighty-two.

§ 6403. Management and powers of title insurance corporation

(a) The business and affairs of every title insurance corporation shall be managed under the direction of its board of directors.

(b) Every title insurance corporation shall, subject to the exceptions and restrictions contained in this chapter, have power to do, in addition to the powers granted by the business corporation law, only the following kinds or any of the kinds of business, of which those specified in paragraphs one and two hereof shall be deemed doing an insurance business:

(1) To make and to guarantee the correctness of searches for all instruments affecting titles to real property, chattels real, and cooperative units and proprietary leases, and for all liens or charges affecting the same.

(2) To issue title insurance policies.

(3) To examine titles to real property and chattels real and to procure and furnish information in relation thereto and to personal property used in connection therewith.

(4) To invest in, purchase and sell mortgages upon improved and unencumbered real property appraised for at least fifty per centum more than the amount loaned thereon or obligations secured by such mortgages or senior participations or interests therein, without guaranteeing the performance of any contract in respect thereto or the guaranteeing of payment of taxes, penalties, foreclosure costs or other expenses with respect to the same. "Senior participation", in this section, means all that portion or portions of the obligation secured by a first mortgage

which has legal priority over all other portion or portions of such obligation, known as junior participation.

(5) To invest in or acquire for resale, (i) obligations secured by a mortgage (including any part of an issue of such obligations) which are insured or committed to be insured by the Federal Housing Administrator, or (ii) debentures lawfully issued by the Federal Housing Administrator.

(6) To act as agent in fact for investors in, and the holders of, mortgages or obligations mentioned in paragraphs four and five hereof, and interests therein, in the purchase, sale and servicing thereof; to act as agent in fact for investors in supervising and inspecting land and buildings for the purpose of loans to be made thereon, and in recommending, without any guaranty or similar undertaking as to the amounts of such loans and amounts to be advanced thereon, but not to engage in the business of making real estate appraisals.

(c) No title insurance corporation doing business in this state shall expose itself to any loss on any one risk in an amount exceeding the sum of its capital, surplus, statutory premium and any voluntary reserves, all as shown in its most recent quarterly or annual statement filed with the superintendent. Any risk or portion thereof which shall have been reinsured with an assuming insurer authorized to do such business in this state shall be deducted in determining the limitation of risk prescribed in this subsection. Credit to the ceding insurer for reinsurance with an unauthorized insurer shall be allowed to the extent permitted by a regulation of the superintendent.

§ 6404. Assets; title plant; valuation

In determining the financial condition of any corporation doing business under this article, the superintendent shall allow as admitted assets only such assets as are prescribed by section one thousand three hundred one of this chapter and as are not excluded by section one thousand three hundred two of this chapter, except as follows:

(a) The superintendent may allow as an admitted asset of such corporation its title plant or plants covering real property located within or without the state of New York, at its fair value as determined by him; provided, however, that with respect to any title plant or plants acquired after December thirty-first, nineteen hundred fifty-four, such value shall be reduced by not less than ten percent of the amount thereof on December thirty-first of the third year following the acquisition of such title plant or plants, and be further reduced by ten percent of said original amount on the thirty-first day of December of each succeeding calendar year, and provided further that in no event shall the aggregate amount allowed for any title plant or plants acquired after December thirty-first, nineteen hundred sixty-nine, exceed five percent of the total admitted assets of such corporation.

(b) The superintendent shall allow as admitted assets premiums and fees for title examination and insurance and for abstracts and searches, not more than ninety days past due. Such premiums and fees shall be deemed to be due when the services for which such premiums and fees are chargeable shall have been performed, except that with respect to abstracts and searches, not later than the closing of the transaction for which the services were rendered,

and with respect to examinations on a closed title basis premiums and fees shall be deemed due when title is closed.

§ 6405. Reserves

(a) Every title insurance corporation organized and doing an insurance business under this article shall establish, segregate and maintain a reinsurance reserve during the period and for the uses and purposes hereinafter provided which shall at all times and for all purposes be deemed and shall constitute unearned portions of the original premiums and shall be charged as a reserve liability of such corporation in determining its financial condition.

(1) Beginning June first, nineteen hundred forty-five, the amount of such reserve shall be cumulative and shall consist of (i) one dollar fifty cents for each risk assumed under a binder or policy of insurance or any certificate or agreement issued under either of them, plus one-eightieth of one percent of the face amount of insurance effected thereby; and (ii) three percent of the gross fees and premiums received by it for guaranteed certificates of title, guaranteed searches and guaranteed abstracts of title not included in item (i) of this paragraph. That portion of the reinsurance reserve established as required by this paragraph more than one hundred eighty months prior shall be released and shall no longer constitute part of the reinsurance reserve and may be used for any corporation purpose.

(2) Beginning January first, nineteen hundred eighty-six, the amount of such reserve provided shall consist of (i) one dollar fifty cents for each risk assumed under a binder or policy of insurance or any

certificate or agreement issued under either of them, plus one-eightieth of one percent of the face amount of insurance effected thereby; and (ii) three percent of the gross fees and premiums received by it for guaranteed certificates of title, guaranteed searches and guaranteed abstracts of title not included in item (i) of this paragraph. "Risk assumed" and "insurance effected", as used in this paragraph, shall not include the face amount of a policy insuring a lender to the extent of the face amount of a policy insuring the owner of an interest in the same land under an owner's policy which provides that any amount paid under the lender's policy shall reduce the amount of, and be deemed a payment under, the owner's policy. A title insurer shall release from the reinsurance reserve established as required by this paragraph a sum equal to five percent of the amount added to the reserve during each year following the year in which the sum was added, until the entire amount added has been released.

(b) Every title insurance corporation organized or authorized to do business in this state shall on or before March first each year, file a report in such form as may be prescribed by the superintendent of all unpaid losses and claims upon title insurance policies, guaranteed certificates of title, guaranteed searches and guaranteed abstracts of title (such policies, certificates, searches and abstracts being hereafter in this section called "guarantees") of which the corporation has received due notice in writing from or on behalf of the insured or the guaranteed and keep such records thereof as may be prescribed by the superintendent. Every title insurance corporation doing business under this article shall set up and maintain a loss reserve at least equal to the aggre-

gate estimated amounts due or to become due on account of all such unpaid losses and claims.

(c) The reinsurance reserve required by subsection (a) of this section shall be maintained as follows:

Admitted assets of a value at least equal to the amount required for such reserve shall be continuously held by the corporation as a segregated reserve fund at all times distinct and separate from all its other assets. Cash paid into such fund shall, unless invested, be kept in legal tender or deposited in a separate account. Securities which are a part of such fund shall be kept separate from all other securities and shall be clearly identified as securities belonging to such fund. The net income and profits derived from such fund investments shall be transferred to the general assets of the corporation. Such corporation shall at all times keep a separate record of the cash and securities in such fund, giving complete identification of the assets belonging at any time to such fund and showing full particulars as to withdrawals and additions. No assets of such fund shall be taken or used in satisfaction of any claim against such corporation except as hereinafter provided and such fund shall be held solely for the purpose of satisfying such claims.

(d) The funds constituting the reinsurance reserve required by subsection (a) of this section shall be held in cash or invested only in the types of reserve investments that meet the requirements of paragraphs one, two, and three of subsection (a) of section one thousand four hundred four of this chapter. In no event shall the investment made under such paragraph three exceed twenty percent of the reinsurance reserve at preceding year-end.

(e) If at any time the superintendent finds from the report of any examiner filed pursuant to section three hundred eleven of this chapter or otherwise, after reasonable notice to and hearing of such corporation, that the value of the cash and investments lawfully in the reserve fund required to be established, segregated and maintained by subsection (c) of this section is less than the amount required to be maintained at such time pursuant to subsection (a) of this section, the superintendent shall determine the amount of such impairment and issue a written requisition to such corporation to remove, repair or make good such impairment within such period as he shall designate, not less than thirty nor more than ninety days from the service of such requisition. If at the expiration of such designated period such impairment has not been removed, repaired or made good, the superintendent shall order such corporation in writing to cease doing any new business. If such corporation, or any officer thereof, having notice of such order of the superintendent, shall thereafter transact or participate in the transaction of any new business, such corporation or person shall be in violation of the provisions of this chapter.

(f) The reinsurance reserve fund required to be maintained pursuant to subsection (c) of this section shall constitute a separate and distinct trust fund for the security of holders of guarantees of the corporation as hereinafter provided.

(g) In the event the superintendent, pursuant to the provisions of article seventy-four of this chapter, obtains an order for the rehabilitation or liquidation of a title insurance corporation, he shall have the power:

(1) to pay out of such reinsurance reserve fund, subject to the approval of the court, the claims for losses sustained by the holders of guarantees of such corporation pending at the time of the making of such order or arising subsequently thereto and up to the time reinsurance is effected, and

(2) to negotiate and enter into a contract with one or more solvent corporations authorized to transact the business of title insurance, subject to the approval of the court, for the reinsurance of the obligations under such outstanding guarantees in accordance with their terms, covenants and conditions, and

(3) to pay the cost of reinsurance out of said reinsurance reserve fund of such corporation.

(h) After the payments hereinbefore authorized shall have been made by the superintendent, he shall transfer any balance in said reinsurance reserve fund to the general assets of the corporation in rehabilitation or liquidation. The reinsuring corporation shall segregate and maintain the reinsurance reserve fund acquired from the superintendent under the terms of the agreement of reinsurance except that on the first day of the month next succeeding such acquisition and on the first day of each month thereafter, one one-hundred-eightieth of the amount of the said fund so acquired shall be released therefrom and shall no longer constitute part of the reinsurance reserve fund so acquired and may be used for any corporate purpose of the reinsuring corporation.

(i) In the event the superintendent shall be unable to effect a contract for reinsurance as provided in subsection (g) of this section, for the reinsurance of the outstanding guarantees of a title corporation in

rehabilitation or liquidation, the reinsurance reserve fund of such corporation shall constitute a separate and distinct trust fund for the payment therefrom by the superintendent, on the approval of the court, in the following order of preference, (i) of all expenses of proceedings incurred under this subsection, (ii) of all allowed claims for losses sustained by the holders of guarantees of such corporation which are unpaid or pending at the time fixed by the court for the filing of claims and (iii) of all allowed claims for losses which shall be asserted at any time within twenty years from the date of the entry of such order of rehabilitation or liquidation and which shall be paid in the order of the date of their allowance by the court. Any balance in the reinsurance reserve fund of a title insurance corporation after payment of allowed claims asserted within twenty years from the date of the entry of the order of rehabilitation or liquidation shall be transferred to the general assets of such corporation. The superintendent shall keep and retain for such period of twenty years all title records of the corporation which he in his discretion shall deem necessary to effectuate the purposes of this trust.

(j) The payments out of the reinsurance reserve fund which shall have been made by the superintendent on allowed claims for losses which shall have been filed within the time fixed by the court for the filing of claims in a rehabilitation or liquidation proceeding, shall constitute an allowed claim in favor of the reinsurance reserve fund of such corporation entitled to share with general creditors in the dividends directed to be paid and the dividends so paid on such claim shall fall into such reinsurance reserve fund.

(k) In proceedings for the rehabilitation or liquidation of a title insurance corporation which shall not have been declared insolvent, no assets of such corporation shall be distributed to the shareholders of such corporation (i) until all claims allowed in the rehabilitation or liquidation proceedings have been paid in full, and (ii) if such distribution is within twenty years from the date of the entry of the order of rehabilitation or liquidation such distribution shall not be made unless prior to or at the time of the making of such distribution there shall be transferred to the reinsurance reserve fund general assets of the corporation sufficient to restore such fund to its amount on the date of the entry of such order. Upon the expiration of twenty years from the date of the entry of such order of rehabilitation or liquidation any balance in such reinsurance reserve fund after payment of all allowed claims asserted within such twenty year period shall be transferred to the general assets of such corporation.

§ 6406. Investments; exception

(a) Every title insurance corporation organized and doing business under this article shall invest and keep invested an amount at least equal to its required minimum capital in the types of investments specified in section one thousand four hundred two of this chapter, except that it shall invest and keep invested at least thirty-five percent of its minimum capital in those types of investments specified in paragraphs one and two of subsection (b) of such section.

(b) Every title insurance corporation organized and doing a title insurance business under this article shall confine its investment of all of its funds, other than those specified in subsection (a) hereof, to

investments permitted by paragraph two of subsection (a) of section one thousand four hundred three of this chapter except as follows:

(1) No loan secured by mortgage on any one piece or parcel of property (excluding any part guaranteed under title three of the Servicemen's Readjustment Act of 1944 (38 U.S.C. § 1801)) shall at the time of investment exceed (i) three-fourths of the value of the real property securing the same if (I) such real property is primarily improved by a single family residence, (II) the aggregate principal amount of the loan or loans secured by such real property does not exceed thirty thousand dollars, and (III) the evidences of indebtedness provide for amortization of principal over a period of not more than thirty years, or (ii) two-thirds of the value of the real property securing the same in all other cases, as shown by the appraisal of one or more competent and experienced appraisers.

(2) Any such corporation may invest in loans secured by mortgages on real property guaranteed as to principal or interest by the United States.

(3) No title insurance corporation shall at any time have invested in bonds, notes or other evidences of indebtedness secured by deeds of trust or real estate mortgages, as specified in this paragraph except bonds or notes secured by mortgage or trust deed guaranteed or insured by the federal housing administration under an act of congress of the United States of June 27, 1934, entitled the "National Housing Act," (12 U.S.C. § 1701). Notwithstanding the provisions of clause (I) of item (v) of subparagraph (A) of paragraph four of subsection (a) of section one thousand four hundred four of this chapter, the aggregate investments held by a title insur-

ance corporation of the types described in such subparagraph and in purchase money mortgages received by it in part payment of the consideration for the sale or exchange of real property owned by it, shall not exceed seventy percent of its admitted assets as shown by its last statement on file with the superintendent.

(4) No title insurance corporation shall invest in or lend upon the security of any one parcel of property an amount exceeding seven percent of its total admitted assets, except that such corporation may invest in or lend upon an obligation or obligations secured by a mortgage or mortgages on property guaranteed as to principal or interest by the United States, or guaranteed or insured under the National Housing Act (12 U.S.C. § 1701), an amount not exceeding twenty-five percent of its total admitted assets, if at the time of the making of the commitment for such investment or loan such corporation shall have entered into an agreement in writing with a mortgagee approved under the provisions of the National Housing Act, for the sale of such investment or loan for an amount in cash not less than the full amount of such investment or loan.

(5) Notwithstanding the provisions of paragraph eight of subsection (a) of section one thousand four hundred four of this chapter, no title insurance corporation shall invest in, or otherwise acquire or loan upon in any one institution's outstanding equity interests an amount which exceeds two percent of the admitted assets of such title insurance corporation as shown by its last statement on file with the superintendent. The aggregate cost of all investments in equity interests then held by any title insurance corporation pursuant to this paragraph, paragraph

six hereof, section one thousand four hundred three and paragraph eight of subsection (a) of section one thousand four hundred four of this chapter shall not exceed the lesser of twenty-five percent of the insurer's total admitted assets or one-half of the insurer's surplus to policyholders as shown by its last statement on file with the superintendent.

(6) Notwithstanding the provisions of paragraph eight of subsection (a) of section one thousand four hundred four of this chapter and paragraph five hereof, a title insurance corporation may invest in the shares of other insurance corporations and in the shares and obligations of any corporation which is engaged exclusively in a kind of business properly incidental to the insurance business of such title insurance corporation, amounts which do not in total exceed ten percent of its total admitted assets as shown by its last statement on file with the superintendent.

(7) No title insurance corporation shall hold a direct or indirect ownership interest in a risk retention group, as defined in article fifty-nine of this chapter, other than in a risk retention group all of whose members are insurance companies.

§ 6407. Restrictions on dividends

(a) No title insurance corporation shall declare or pay any cash or property dividend on its capital shares, or declare or distribute a stock dividend except out of earned surplus, meaning, for the purpose of this section, surplus not attributable to contributions made to surplus within five years next preceding or to appreciation in value of investments not sold or otherwise disposed of.

(b) No such corporation shall declare or pay any cash or property dividend to shareholders which, together with all such dividends declared or paid by it during the next preceding twelve months, exceeds ten percent of its then outstanding capital shares unless, after deducting such dividends, it has a surplus to policyholders at least equal to fifty percent of its reinsurance reserve or a surplus at least equal to fifty percent of the minimum capital required of such insurer to transact the business of title insurance, whichever shall be greater. For the purpose of this section, "surplus" means the amount of the insurer's admitted assets in excess of (i) all of its liabilities, including its reinsurance reserve, and (ii) its outstanding capital shares.

(c) No such corporation shall declare or distribute any stock dividend which shall reduce surplus to an amount less than fifty percent of its then outstanding capital shares.

§ 6408. Prohibition on engaging in certain business activities

(a) No person, firm, association or corporation shall engage in business as a title insurance corporation except pursuant to the provisions of this article. This prohibition shall not prevent the making, issuing, or furnishing of any abstract, search, examination, survey or certificate of title without guarantee or insurance thereof, nor the doing of any business specified in paragraphs three, four, five and six of subsection (b) of section six thousand four hundred three of this article.

(b) Except as in this article provided, no corporation organized or doing business under this article

shall engage in the business of selling certificates or participations in obligations secured by mortgages.

(c) Except as provided in this article or in article sixty-five of this chapter, no person, firm, association or corporation shall, in this state, engage, or make any public proposal to engage, in the business of guaranteeing mortgages of real or personal property, or of selling any guaranteed mortgage or interest therein.

(d) Notwithstanding any other provisions of this article, no person, firm, association or corporation organized or qualified under this article shall in this state hereafter engage, or make any public proposal to engage, in the business of selling any mortgage, certificate of participation or interest in any mortgage or mortgages, or certificate secured by the deposit of any cash, mortgage or mortgages or other securities, coupled with any agreement to repurchase.

§ 6409. Filing of policy forms; rates; classification of risks; commissions and rebates prohibited

(a) No title insurance policy shall be issued or delivered in this state, unless and until a copy of the form thereof shall have been filed with the superintendent for his information.

(b) Every title insurance corporation shall file with the superintendent its rate manual, if any, its basic schedule of rates and classification of risks, its rating plan and rules in connection with the writing or issuance of policies of title insurance and shall thereafter likewise file any changes therein. After any such filing no such corporation shall, in connection with the writing or issuance of any such policy, deviate from the rates, classifications of risks and rules last filed by it, either by making any reduction

in rates without having filed the same as herein provided, or by way of any discriminations in favor of or against any insured. The superintendent shall have the powers specified in article twenty-three of this chapter applicable to title insurers.

(c) Notwithstanding any other provision of this article, every title insurance company shall be required to offer, at or prior to title closing, an optional policy form which will insure the title of owner-occupied real property used predominantly for residential purposes which consists of not more than four dwelling units for an amount equal to the market value of the property at the time a loss is discovered. Such policy form shall be filed with the superintendent pursuant to subsection (a) of this section. Rates for such coverage shall be filed pursuant to subsection (b) of this section.

(d) No title insurance corporation or any other person acting for or on behalf of it, shall make any rebate of any portion of the fee, premium or charge made, or pay or give to any applicant for insurance, or to any person, firm, or corporation acting as agent, representative, attorney, or employee of the owner, lessee, mortgagee or the prospective owner, lessee, or mortgagee of the real property or any interest therein, either directly or indirectly, any commission, any part of its fees or charges, or any other consideration or valuable thing, as an inducement for, or as compensation for, any title insurance business. Any person or entity who accepts or receives such a commission or rebate shall be subject to a penalty equal to the greater of one thousand dollars or five times the amount thereof.

(e) Premium rates for coverage shall fully reflect the foregoing prohibitions of subsection (d) hereof.

§ 6410. Merger

The merger of two or more corporations organized pursuant to section six thousand four hundred two of this article or organized under the laws of this state for the purpose set forth in section six thousand four hundred three of this article, unless it be a merger governed by section six thousand four hundred eleven of this article, shall be governed by those provisions of article seventy-one of this chapter which relate to the merger of two or more domestic stock insurance corporations and which are not inconsistent with any of the provisions of this article, except that:

(a) the proposed charter of the surviving company shall provide for not less than thirteen nor more than thirty directors;

(b) in addition to delivery in person or by mail, the notice of the shareholders meeting provided for in subsection (a) of section seven thousand one hundred four of this chapter shall be published for at least two successive weeks in one of the newspapers in each of the counties of this state in which either of the constituent companies shall have its principal place of business;

(c) in lieu of the provisions of section seven thousand one hundred nineteen of this chapter, if any shareholder not voting in favor of such agreement of merger shall, at such meeting or within twenty days thereafter, object to such merger and demand payment for his shares, he may, at any time within sixty days after such merger, apply to the supreme court at any special term thereof, held in the district in which the county is situated, in which the surviving company has its principal place of business, upon at least eight days' notice to said company for the

appointment of three persons to appraise the value of his shares, and the court shall appoint such appraisers and designate the time and place of their first meeting, with such directions in regard to their proceedings as shall be deemed proper. The court may fill any vacancies in the board of appraisers occurring by refusal or neglect to hold such office. The appraisers shall meet at the time and place designated and after being duly sworn, shall honestly and faithfully discharge their duties and estimate and certify the value of such shares, and deliver one copy to such company and another to such shareholder, if demanded; the charges and expenses of the appraisers shall be paid by the company. When the company shall have paid the appraised value of such shares, as directed by the court, said shares shall be canceled and such shareholder shall cease to have any interest in such shares and in the company property, and such shares may be held and disposed of by the company for its own benefit; and

(d) the sum of the capital stock of the surviving company shall not exceed the limit permitted to either constituent company at the time of merger.

§ 6411. Merger of parent corporation and wholly-owned subsidiary

(a) Notwithstanding the provisions of section six thousand four hundred ten of this article and article fifteen of this chapter, and any rights conferred therein or obligations imposed thereby, any corporation organized under section six thousand four hundred two of this article, or organized under the laws of this state for the purposes set forth in section six thousand four hundred three of this article, owning all the shares of any title insurance corporation may file in the office of the superintendent a

certificate of such ownership in its name and under its corporate seal, signed by its president or a vice president and its secretary or treasurer and setting forth a duly certified copy of the resolution of its board of directors to merge such other corporation, and to assume all of its obligations, and the date of the adoption thereof. A duplicate or certified copy of such certificate with the approval required by subsection (b) hereof endorsed thereon or annexed thereto shall be filed in the office of the clerk of the county wherein the principal office of the parent corporation is located. Upon the filing of such certificate, all of the estate, property, rights, privileges and franchises of such other corporation shall vest in and be held and enjoyed by the parent corporation as fully and entirely and without change or diminution as the same were before held and enjoyed by such other corporation, and be managed and controlled by the parent corporation, and, in its name, but subject to all liabilities and obligations of such other corporation and the rights of all creditors thereof which the parent corporation shall be deemed to have assumed and become liable for in the same manner as if it had itself incurred such liabilities and obligations. The parent corporation shall not thereby acquire power to engage in any business or to exercise any right, privilege or franchise of a kind which it could not lawfully engage in or exercise under the provisions of the law by or pursuant to which such parent corporation is organized.

(b) Such merger shall not become effective unless and until the superintendent shall give his approval thereto. Such approval shall be endorsed upon or annexed to the certificate of merger before filing and the certificate filed as required by subsection (a) hereof.

APPENDIX L

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Case No. 2:08-cv-00466(TCP)(WDW)

BRENDAN DOLAN, BRIAN MCHALE, THOMAS PERRY, JONATHAN RAPAPORT, MBSF ALABAMA LLC, JOSEPH RAGUSA, KRISTEN RAGUSA, MARSHALL COOK, DOUGLAS BROWN, REBECCA BROWN, ALEX WINTNER, TUTTNAUER USA CO., LTD., LAWRENCE FISHER, RIGOBERTO CAPELLAN, VALERIO GONZALEZ, MARIA ELENA OCHOA, LENNY GONZALEZ, CHRISTOPHER P. AJEMIAN, SARA JULI, VINCENT BARBIERI, TERESA TANNAZZO BARBIERI, MICHAEL LOLLO, MAEGHAN LOLLO, BRANDON RAYMAR, MELINDA RAYMAR, AND JOHN SHERIDAN, on behalf of themselves and those similarly situated,

Plaintiffs,

v.

FIDELITY NATIONAL TITLE INSURANCE COMPANY, CHICAGO TITLE INSURANCE COMPANY, TICOR TITLE INSURANCE COMPANY, FIDELITY NATIONAL FINANCIAL, INC., FIRST AMERICAN TITLE INSURANCE COMPANY OF NEW YORK, UNITED GENERAL TITLE INSURANCE COMPANY, FIRST AMERICAN CORPORATION, COMMONWEALTH LAND TITLE INSURANCE COMPANY, LAWYERS TITLE INSURANCE CORPORATION, LANDAMERICA FINANCIAL GROUP, INC., STEWART TITLE INSURANCE COMPANY, STEWART TITLE GUARANTY COMPANY, MONROE TITLE INSURANCE CORPORATION, STEWART INFORMATION SERVICES CORPORATION, AND TITLE INSURANCE RATE SERVICE ASSOCIATION, INC.,

Defendants.

CONSOLIDATED CLASS ACTION COMPLAINT AND JURY DEMAND

Plaintiffs Brendan Dolan, Brian McHale, Thomas Perry, Jonathan Rapaport, MBSF Alabama LLC, Joseph Ragusa, Kristen Ragusa, Marshall Cook, Douglas Brown, Rebecca Brown, Alex Wintner, Tuttnauer USA Co., Ltd., Lawrence Fisher, Rigoberto Capellan, Valerio Gonzalez, Maria Elena Ochoa, Lenny Gonzalez, Christopher P. Ajemian, Sara Juli, Vincent Barbieri, Teresa Tannazzo Barbieri, Michael Lollo, Maeghan Lollo, Brandon Raymar, Melinda Raymar, and John Sheridan, on behalf of themselves and those similarly situated, upon knowledge with respect to their own acts and upon information and belief with respect to all other matters, allege as follows:

SUMMARY OF CLAIMS

1. This case challenges as a *per se* illegal price-fixing agreement the collective setting by defendants—which include the country's four largest title insurance companies—of the rates that consumers pay for title insurance in New York.

2. Under the New York State Insurance Law ("Insurance Law"), title insurance rates may be set by an insurer through a rate service organization comprised of the state's title insurers. Pursuant to the Insurance Law, defendants (along with other title insurers) formed Title Insurance Rate Service Association, Inc. ("TIRSA") in 1991. TIRSA collects from defendants and TIRSA's other members revenue and cost information and annually submits it in aggregate form along with collectively set title insurance rates to the New York Insurance Department

("Insurance Department"). Under this rate setting scheme, defendants have charged identical and collectively fixed rates to consumers since TIRSA's inception.

3. The Insurance Department is supposed to carefully review the title rates that defendants (through TIRSA) collectively fix. However, defendants have made this impossible by manipulating the rates so that they are principally based on costs that the Insurance Department has neither the authority nor the ability to assess. These costs are referred to as so-called "agency commissions." They chiefly cover kickbacks and other costs unrelated to the issuance of title insurance. These supposed costs are funneled to and through title agents to increase defendants' overall revenues and get them more business. The Insurance Department does not have regulatory authority over title agents or their activities.

4. So, with respect to the rate setting activity the Insurance Department has authorized, defendants have acted outside of this authority. They have done so by improperly including unregulated and unauthorized costs within their collectively set rates. And, they have embedded these supposed costs within the agency commissions paid to title agents who are not licensed or otherwise subject to regulatory review by the Insurance Department. Indeed, the Insurance Department has unequivocally recognized and publicly stated that it does not and cannot evaluate these agency commissions. Since these payments typically account for roughly 85 percent of the total costs that go into TIRSA's rate calculation, defendants have effectively precluded the Insurance Department from actively supervising or conducting

any kind of meaningful review of TIRSA's collective rate setting activity.

5. Unchecked by competition or regulatory oversight, defendants have been able to collectively fix and maintain their title insurance rates in New York at supracompetitive levels. These rates—which for the average home or property purchaser are in the thousands of dollars—bear no reasonable relationship to the cost or expense of providing the insurance. And, they have been imposed on consumers who lack the knowledge and opportunity to challenge them.

6. Plaintiffs, on behalf of themselves and a putative Class of all those similarly situated, bring this action to enjoin defendants' anticompetitive, deceptive, and otherwise unlawful conduct and recover damages for the illegal overcharges the Class has paid.

JURISDICTION AND VENUE

7. Plaintiffs bring this action under Section 16 of the Clayton Act, 15 U.S.C. § 26, to prevent and restrain violations of Section 1 of the Sherman Act, 15 U.S.C. § 1, and for damages under Section 4 of the Clayton Act, 15 U.S.C. § 15. Plaintiffs also bring this action under New York General Business Law § 349, and the common law. This Court has jurisdiction over the federal claims under 28 U.S.C. §§ 1331 and 1337. This Court has supplemental jurisdiction over the state law claims under 28 U.S.C. § 1367. This Court also has jurisdiction over the state law claims under 28 U.S.C. § 1332(d)(2).

8. Venue is proper in this judicial district under 28 U.S.C. § 1391 and 15 U.S.C. § 22 because each defendant is a corporation that is found or transacts business in this district, and because a substantial

portion of the affected trade and commerce described herein has been carried out in this district.

9. The violations of antitrust law alleged herein have substantially affected interstate commerce. Defendants sell title insurance throughout the United States collecting billions of dollars in premiums annually.

THE PARTIES

A. Plaintiffs

10. Brendan Dolan is a resident of Woodside, New York. On October 6, 2004, Mr. Dolan purchased title insurance from defendant Chicago Title Insurance Company ("Chicago Title") in connection with his purchase of a property located in Maspeth, New York. Mr. Dolan paid $2,252 for the insurance. This price was artificially high because of defendants' anticompetitive, deceptive, and otherwise unlawful conduct. On June 17, 2005, Mr. Dolan also purchased title insurance from defendant Chicago Title in connection with his purchase of a property located in Woodside, New York. Mr. Dolan paid $2,518 for the insurance on this second property. This price was artificially high because of defendants' anticompetitive, deceptive, and otherwise unlawful conduct.

11. Brian McHale is a resident of Massapequa, New York. On September 28, 2007, Mr. McHale purchased title insurance from defendant Stewart Title Insurance Company ("Stewart Title") in connection with his purchase of a property located in Massapequa, New York. Mr. McHale paid $2,064 for the insurance. This price was artificially high because of defendants' anticompetitive, deceptive, and otherwise unlawful conduct.

12. Thomas Perry is a resident of Islip Terrace, New York. On July 30, 2007, Mr. Perry purchased title insurance from defendant Fidelity National Title Insurance Company ("Fidelity Title") in connection with his purchase of a property located in Islip Terrace, New York. Mr. Perry paid $2,322 for the insurance. This price was artificially high because of defendants' anticompetitive, deceptive, and otherwise unlawful conduct.

13. Jonathan Rapaport is a resident of New York, New York. On April 30, 2007, Mr. Rapaport purchased title insurance from defendant Chicago Title in connection with his purchase of a property located in New York, New York. Mr. Rapaport paid $3,479 for the insurance. This price was artificially high because of defendants' anticompetitive, deceptive, and otherwise unlawful conduct.

14. MBSF Alabama LLC ("MBSF") is located in Brooklyn, New York. On March 2, 2005, MBSF purchased title insurance from defendant United General Title Insurance Company ("United General Title") in connection with its purchase of properties located in Brooklyn, New York. MBSF paid $18,085 for the insurance. This price was artificially high because of defendants' anticompetitive, deceptive, and otherwise unlawful conduct.

15. Joseph and Kristin Ragusa are residents of Islip Terrace, New York. On March 2, 2005, the Ragusas purchased title insurance from defendant First American Title Insurance Company of New York ("First American Title") in connection with their purchase of a property located in Islip Terrace, New York. The Ragusas paid $1,846 for the insurance. This price was artificially high because of defendants'

anticompetitive, deceptive, and otherwise unlawful conduct.

16. Marshall Cook is a resident of East Hills, New York. On August 8, 2007, Mr. Cook purchased title insurance from defendant Commonwealth Land Title Insurance Company ("Commonwealth") in connection with his purchase of a property located in East Hills, New York. Mr. Cook paid $3,251 for the insurance. This price was artificially high because of defendants' anticompetitive, deceptive, and otherwise unlawful conduct.

17. Douglas Brown and Rebecca Brown are residents of Plainview, New York. On June 7, 2006, the Browns purchased title insurance from defendant Lawyers Title Insurance Corporation ("Lawyers Title") in connection with their purchase of a property located in Plainview, New York. The Browns paid $2,474 for the insurance. This price was artificially high because of defendants' anticompetitive, deceptive, and otherwise unlawful conduct.

18. Alex Wintner is a resident of Woodmere, New York. On November 16, 2004, Mr. Wintner purchased title insurance from defendant Commonwealth in connection with his purchase of a property located in Woodmere, New York. Mr. Wintner paid $2,669 for the insurance. This price was artificially high because of defendants' anticompetitive, deceptive, and otherwise unlawful conduct.

19. Tuttnauer USA Co., Ltd. ("Tuttnauer") is located in Smithtown, New York. On January 11, 2007, Tuttnauer purchased title insurance from defendant Chicago Title in connection with its purchase of a property located in Smithtown, New York. Tuttnauer paid $2,606 for the insurance. This price

was artificially high because of defendants' anticompetitive, deceptive, and otherwise unlawful conduct.

20. Lawrence Fisher is a resident of Chappaqua, New York. On July 15, 2005, Mr. Fisher purchased title insurance from defendant Stewart Title in connection with his purchase of a property located in Chappaqua, New York. Mr. Fisher paid $8,248 for the insurance. This price was artificially high because of defendants' anticompetitive, deceptive, and otherwise unlawful conduct.

21. Rigoberto Capellan is a resident of Massapequa, New York. On May 5, 2006, Mr. Capellan purchased title insurance from defendant Commonwealth in connection with his purchase of a property located in Massapequa, New York. Mr. Capellan paid $2,170 for the insurance. This price was artificially high because of defendants' anticompetitive, deceptive, and otherwise unlawful conduct.

22. Valerio Gonzalez, Maria Elena Ochoa, and Lenny Gonzalez are residents of Shirley, New York. On September 14, 2004, Messrs. Gonzalez and Ms. Ochoa purchased title insurance from defendant Lawyers Title in connection with their purchase of a property located in Shirley, New York. Messrs. Gonzalez and Ms. Ochoa paid $3,357 for the insurance. This price was artificially high because of defendants' anticompetitive, deceptive, and otherwise unlawful conduct.

23. Christopher P. Ajemian and Sara Juli are residents of Brooklyn, New York. On November 14, 2007, Mr. Ajemian and Ms. Juli purchased title insurance from defendant Lawyers Title in connection with their purchase of a property located in Brooklyn, New York. Mr. Ajemian and Ms. Juli paid

$3,357 for the insurance. This price was artificially high because of defendants' anticompetitive, deceptive, and otherwise unlawful conduct.

24. Vincent Barbieri and Theresa Tannazzo Barbieri are residents of Seaford, New York. On December 18, 2007, the Barbieris purchased title insurance from defendant Commonwealth in connection with their purchase of a property located in Seaford, New York. The Barbieris paid $3,422 for the insurance. This price was artificially high because of defendants' anticompetitive, deceptive, and otherwise unlawful conduct.

25. Michael Lollo and Maeghan Lollo are residents of Medford, New York. On August 16, 2006, the Lollos purchased title insurance from defendant Fidelity Title in connection with their purchase of a property located in Medford, New York. The Lollos paid $1,595 for the insurance. This price was artificially high because of defendants' anticompetitive, deceptive, and otherwise unlawful conduct.

26. Brandon and Melinda Raymar are residents of Merrick, New York. On May 23, 2006, the Raymars purchased title insurance from defendant Commonwealth in connection with their purchase of a property located in Merrick, New York. The Raymars paid $2,158 for the insurance. This price was artificially high because of defendants' anticompetitive, deceptive, and otherwise unlawful conduct.

27. John Sheridan is a resident of Huntington Station, New York. On March 6, 2007, Mr. Sheridan purchased title insurance from defendant Chicago Title in connection with his purchase of a property located in Huntington Station, New York. This price

was artificially high because of defendants' anticompetitive, deceptive, and otherwise unlawful conduct.

B. Defendants

28. The Fidelity family of title insurance companies (collectively, "Fidelity")—which includes defendant Fidelity Title, defendant Chicago Title, defendant Ticor Title Insurance Company ("Ticor Title"), and their affiliates—is engaged in selling title insurance to purchasers of commercial and residential real estate throughout the United States, including New York. Fidelity accounts for roughly 31 percent of the title insurance premiums consumers pay in New York, which in 2006 amounted to roughly $361 million. Nationally, Fidelity accounts for approximately 27 percent of title premiums, which in 2006 amounted to roughly $4.6 billion. Fidelity Title, Chicago Title, and Ticor Title were founding members of TIRSA and since TIRSA's inception have in agreement with the other defendants charged title insurance rates in New York that TIRSA collectively sets.

29. Fidelity Title, Chicago Title, Ticor Title, and their affiliates are wholly-owned and controlled by defendant Fidelity National Financial, Inc. ("Fidelity National"), a Delaware corporation headquartered in Jacksonville, Florida. Through its subsidiaries, Fidelity National is a provider of title insurance, specialty insurance, and claims management services. Fidelity National had 2006 revenues of roughly $9.4 billion. Fidelity engaged in the conduct challenged herein with the approval and assent of Fidelity National.

30. The First American family of title insurance companies (collectively, "First American")—which

includes defendant First American Title, defendant United General Title, and their affiliates—is engaged in selling title insurance to purchasers of commercial and residential real estate throughout the United States, including New York. First American accounts for roughly 25 percent of the title insurance premiums consumers pay in New York, which in 2006 amounted to roughly $290 million. Nationally, First American accounts for approximately 29 percent of title premiums, which in 2006 amounted to roughly $4.8 billion. First American Title and United General Title were founding members of TIRSA and since TIRSA's inception have in agreement with the other the defendants charged title insurance rates in New York that TIRSA collectively sets.

31. First American Title, United General Title, and their affiliates are wholly-owned and controlled by defendant First American Corporation ("FAC"), a California corporation headquartered in Santa Ana, California. Through its subsidiaries, FAC is a provider of title insurance, business information, and related products and services. FAC had 2006 revenues of roughly $8.5 billion. First American engaged in the conduct challenged herein with the approval and assent of FAC.

32. The LandAmerica family of title insurance companies (collectively, "LandAmerica")—which includes defendant Commonwealth, defendant Lawyers Title, and their affiliates—is engaged in selling title insurance to purchasers of commercial and residential real estate throughout the United States, including New York. LandAmerica accounts for roughly 22 percent of title insurance premiums consumers pay in New York, which in 2006 amounted to roughly $258 million. Nationally, LandAmerica

accounts for approximately 19 percent of title premiums, which in 2006 amounted to roughly $3.15 billion. Commonwealth and Lawyers Title were founding members of TIRSA and since TIRSA's inception have in agreement with the other defendants charged title insurance rates in New York that TIRSA collectively sets.

33. Commonwealth, Lawyers Title, and their affiliates, are wholly-owned and controlled by defendant LandAmerica Financial Group, Inc. ("LAFG"), a Virginia corporation headquartered in Glen Allen, Virginia. Through its subsidiaries, LAFG is a provider of title insurance and other products and services that facilitate the purchase, sale, transfer, and financing of residential and commercial real estate. LAFG had 2006 revenues of roughly $4 billion. LandAmerica engaged in the conduct challenged herein with the approval and assent of LAFG.

34. The Stewart family of title insurance companies (collectively, "Stewart")—which includes defendant Stewart Title, defendant Stewart Title Guaranty Company ("Stewart Guaranty"), defendant Monroe Title Insurance Corporation ("Monroe Title"), and their affiliates—is engaged in selling title insurance to purchasers of commercial or residential real estate throughout the United States, including New York. Stewart accounts for roughly 14 percent of the title insurance premiums consumers pay in New York, which in 2006 amounted to roughly $168 million. Nationally, Stewart accounts for approximately 12 percent of title premiums, which in 2006 amounted to roughly $2 billion. Stewart Title, Stewart Guaranty, and Monroe Title were founding members of TIRSA and since TIRSA's inception have in agreement with

the other defendants charged title insurance rates in New York that TIRSA collectively sets.

35. Stewart Title, Stewart Guaranty, Monroe Title, and their affiliates are wholly-owned and controlled by defendant Stewart Information Services Corporation ("SISC"), a Delaware corporation headquartered in Houston, Texas. Through its subsidiaries, SISC is a provider of title insurance and related information and post-closing lender services. SISC had 2006 revenues of roughly $2.5 billion. Stewart engaged in the conduct challenged herein with the approval and assent of SISC.

36. Together, Fidelity, First American, LandAmerica and Stewart account for more than 90 percent of the title premiums consumers pay in New York, which in 2006 amounted to roughly $1.1 billion. Nationally, they account for more than 85 percent of title premiums, which in 2006 amounted to roughly $14.5 billion. Throughout the relevant damages period, defendants charged New York consumers identical title insurance rates that they collectively set through TIRSA.

37. Defendant TIRSA is a voluntary association of title insurers licensed as a rate service organization pursuant to Article 23 of the Insurance Law. TIRSA maintains its offices in New York City, which until recently were located at the same New York address as defendant Fidelity Title.

38. TIRSA annually compiles from its members statistical data relating to their title insurance premiums, losses and expenses and submits this information in aggregate form to the Insurance Department. TIRSA also prepares and submits the New York Title Insurance Rate Manual which sets

forth the title rates to be charged and rules to be followed by TIRSA's members. The Insurance Department has never objected to any of the rates TIRSA has collectively set.

39. TIRSA's membership is comprised of defendant insurers and all other title insurers that are licensed to issue policies in New York. Currently, Fidelity, First American, LandAmerica, and Stewart collectively represent a majority of TIRSA's members. As such, they comprise a majority voting block which, according to TIRSA's by-laws, allows them to control the operations of TIRSA and, in particular, TIRSA's collective rate setting activity.

FACTUAL BACKGROUND

A. The Fuzzy World of Title Insurance

40. Title insurance is one of the most costly items associated with the closing of a real estate transaction. In New York, TIRSA's collectively fixed rates for title insurance are based on a percentage of the total value of the property being insured. For residential properties, this price ranges from about $1,200 (for a $250,000 property) to $3,700 (for a $1 million property). For more expensive homes and commercial properties, these prices are significantly higher and can reach the tens of thousands of dollars. In 2006 alone, New York consumers paid roughly $1.2 billion for title insurance, most of which went to defendants and their affiliates. This amount has risen dramatically over the past decade, more than quadrupling the roughly $260 million in insurance premiums that New York consumers paid in 1996.

41. Title insurance protects the purchaser of a property from any unidentified defects in the title that would in any way interfere with the full and

complete ownership and use of the property and with the ultimate right to resell the property. In New York, title insurance is required by lenders in most residential and commercial real estate transactions.

42. Despite the importance and high cost of title insurance, consumers have little understanding of the product, the purpose it serves, and the reasonableness of the price they pay for it. They also have little discretion in choosing the title insurer from which they purchase the insurance. That decision is typically made for them by their lawyer, mortgage broker, lender, or realtor. Consequently, for most purchasers, the cost of title insurance is largely overlooked and seldom, if ever, challenged. Most consumers do not even become aware of the price they will pay and to which insurer they will pay it until the actual closing of the real estate transaction. There is no shopping around. There is no negotiation of price.

43. This dynamic basically removes the sale of title insurance from the normal competitive process. Unlike the regular forces of supply and demand that keep most industries and their pricing in check, the title insurance industry is not subject to any real competitive constraints. The purchasers of the insurance, in most instances, are not the ones making the purchasing decisions. And, they are certainly in no position to question the price. Title insurers thus have little incentive to maintain fair and reasonable pricing. Indeed, they have just the opposite incentive.

44. The most effective way for a particular title insurer to get business is to encourage those making the purchasing decisions—the lawyers, brokers, lenders—to steer business to that insurer. The best way

to so motivate these third-party representatives is not through lower prices (that they are not even paying). Rather, it is through kickbacks in the form of finder's fees, gifts, and other financial enticements. Therefore, it is higher pricing (which allows for these third-party payments), not lower pricing, that provides the best way for title insurers to compete and increase their business.

45. This form of "reverse competition" that characterizes the title insurance industry, coupled with the particular vulnerability of most title insurance consumers, is exactly the reason why most states have seen it fit to regulate the industry. However, New York is only one of a very small number of states in which the leading title insurers collectively fix their prices through a rate-setting organization like TIRSA. And, it may be the only state in which the collectively set rates include "agency commissions" that are neither authorized nor regulated, and which make up the lion's share of the title insurance rates.

B. Agency Commissions

46. There are two principal cost components that go into TIRSA's rate calculation. One comprises the risk associated with issuing the title policy. The other comprises the "agency commissions" paid to title agents.

47. The risk component covers the risk the title insurer bears for any undiscovered defects in the title. Unlike property insurance, title insurance carries with it a very limited risk of loss to the insurer. That is because title insurance protects against *prior* events that cause defects in title. With a proper search and examination of prior ownership records, any such defects can and almost always are

readily identified and excluded from the policy's coverage. Consequently, the average claim payout on a title insurance policy amounts to only about 5 percent of the total premium collected. It is even lower in New York. This is very different from property coverage (such as auto and home insurance)—which protects against *future* occurrences over which the insurer has little to no control—where the average claim payout amounts to about 80 percent of the total premium.

48. The "agency commissions" component of the title insurance rate covers payments made to title agents. Defendants have an ownership or management stake in many of the title agencies to which these payments are made. A small portion of these payments is for the search and exam of prior ownership records of the property being purchased to identify any liens, encumbrances, burdens, exclusions, or other defects in the title. The search and exam function does not involve the spreading or underwriting of risk and title insurers typically outsource this task to title agents.

49. The remainder, and by far the bulk, of the agency commissions is comprised of costs unrelated to the issuance of title insurance. These costs include kickbacks and other financial inducements title insurers provide to title agents and indirectly (through title agents) to the lawyers, brokers, and lenders who, in reality, are the ones deciding which title insurer to use. These payments have nothing to do with the issuance of title insurance and are made by title insurers merely to inflate their revenues and steer business their way.

50. Under TIRSA's collective rate setting regime, roughly 85 percent of the total title insurance premium is based on the so-called "costs" associated with the payment of agency commissions. Only 15 percent is based on costs associated with the risk of loss.

51. TIRSA publishes its final calculated title rates in the New York Title Insurance Rate Manual. These rates are tied to the value of the property being insured. This is so despite the fact that the costs associated with agency commissions are entirely unrelated to the value of the property. Indeed, agency kickbacks and enticements have little to do with producing a particular title policy and provide no value—proportional to property value or otherwise—to the consumer. Even search and exam costs are unrelated to property value. They instead depend on the age of the property, the complexity of the ownership history, and the accessibility of prior ownership records.

C. TIRSA's Formation

52. Prior to TIRSA, the New York Board of Title Underwriters ("NYBTU") served as the title insurance rate-setting body in New York. NYBTU, along with the title insurance rate setting bureaus in many other states, was disbanded in the mid-1980s in the wake of a Federal Trade Commission ("FTC") challenge to the collective rate setting activity of many of these associations. The FTC's challenge culminated in *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992), where the Supreme Court held that to avoid *per se* illegal price fixing liability, the rate setting activity of these rating bureaus must be actively supervised by the state.

53. In *Ticor*, like here, the FTC focused its challenge on agency commissions. The FTC contended that the respective state insurance departments merely rubber-stamped this portion of the collectively fixed rates without any independent review or analysis of their reasonableness or cost justification. The Supreme Court agreed with the FTC that this kind of limited state oversight was not sufficient. Rather, to avoid illegal price-fixing liability, the state insurance department has to "exercise[] sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties." *Ticor*, 504 U.S. at 634-35.

54. Following the Supreme Court's instruction in *Ticor*, the Third Circuit on remand in *Ticor Title Ins. Co. v. FTC*, 998 F.2d 1129 (3d Cir. 1993), upheld the FTC's finding that the collective rate-setting of certain state rating bureaus was improper because it was not actively supervised by the state. According to the circuit court, "[t]he Supreme Court plainly instructed us that a state's rubber stamp is not enough. Active supervision requires the state regulatory authorities' independent review and approval." *Id.* at 1139.

55. Defendants formulated TIRSA's first rate manual and procedure soon after the Supreme Court's *Ticor* decision. Through TIRSA, defendants have set up a rate-setting scheme to get around the rigors of state oversight required by *Ticor*. They have done so by calculating a single rate that comprises both risk and agency commission costs and by outsourcing to title agents the agency commission costs. In this way, defendants avoid providing the

Insurance Department with any detailed breakout or backup for the bulk of the costs that make up their collectively fixed rates.

56. TIRSA merely submits an aggregated figure that is supposed to represent the total agency commission costs. Embedded within this figure is the vast quantity of dollars that are funneled to and through the title agencies as kickbacks, financial inducements and other costs unrelated to the issuance of title insurance. Defendants' design in all of this has been to effectively hide the cost basis for their artificially high and collectively fixed title insurance premiums from the regulatory scrutiny that *Ticor* demands.

D. Lack of Regulatory Supervision and Authority

57. There is no provision under the Insurance Law for TIRSA to include in its collectively fixed rates kickbacks and other agency commission payments unrelated to the issuance of title insurance. Indeed, the Insurance Department has openly acknowledged that it lacks the authority to review any agency commission payments. It has likewise recognized that defendants' outsourcing of agency commission costs has prevented it from performing a meaningful review of TIRSA's calculated rates. This was made clear at a November 2006 public hearing the Insurance Department held—the first in 15 years—where it questioned TIRSA and its members on TIRSA's failure to provide the Insurance Department with any backup or detail for agency commissions.

58. Through this questioning, the head of TIRSA admitted that neither TIRSA nor its members have any idea of what their agency commission costs actually cover:

Q. At the same time you've also testified that your members really don't know what the title agents are doing with the money that they're getting, in other words, they give them 85 percent and as far as they know they have no input or no knowledge of what's being done with the money, I just want to make sure, is that correct? [*Mark Presser, Assistant Deputy Superintendent of Ins. Dept.*]

A. I have no way of knowing . . . what their [the title agents'] expenses are, what their overheads are, what they pay in salaries, what they pay in administrative costs, what they pay in rent and what they pay with every other aspect of their overhead, I have no way of knowing that. [*David Skidikman, Executive Director of TIRSA*]

* * *

Q. I'm just getting at the point that a large portion of the data represents revenue and expenses that are outside the control of the [insurer] and outside of the control of TIRSA and you have no specific knowledge as to how those dollars are being expended, as you just said? [*Assistant Deputy Superintendent of Ins. Dept.*]

A. That's correct. [*Executive Director of TIRSA*]

59. The head of TIRSA further admitted that TIRSA does not even know the actual search and exam costs incurred by title agents on behalf of TIRSA's members:

Q. What are the actual costs to title insurers to the agents to do the necessary searches and all the other things that they need to do in

connection with a title search? [*Howard Mills, Superintendent of Ins. Dept.*]

A. We do not get the agents' statistics because that is between the [insurer] and the agent. [*Executive Director of TIRSA*]

60. From this and other testimony at the hearing, the Insurance Department conceded that it could not properly evaluate TIRSA's collectively set rates, and that it could only do so if it obtained the detailed cost information on agency commissions that TIRSA does not provide:

Q. It seems to me that looking at costs, since this piece is such a significant portion of what the rate is and that's part of what goes into the rate, it seems like that is really an area of inquiry that we should be making to understand what goes into that cost factor. I think that's really an area we need to explore. I don't know how to do that. It seems like it's a significant piece and it doesn't seem like anyone is really telling us what goes into that. Would you agree that that's something we need to explore as part of the rates? [*Joseph Risi, Deputy Superintendent and General Counsel of Ins. Dept.*]

A. Now, TIRSA, as an organization, has no control or no dealing with the agents, we deal only with the [insurers]. So we have no way of knowing what the cost basis is certainly for the agents . . . . [*Executive Director of TIRSA*].

61. Even defendant LAFG of the LandAmerica family echoed this recognition that there can be no meaningful review of TIRSA's calculated rates without first understanding the agency commission costs that make up roughly 85 percent of these rates:

> Q. If you don't look at the expenses of the agents, if you don't really do an analysis of their costs . . ., how do you know the profit they're making is reasonable . . . if you or no one else delves into what they're actually spending the 85 percent on? [*Assistant Deputy Superintendent of Ins. Dept.*]
>
> A. That's a good question . . . . [*Bruce Wright, Senior Vice President of LAFG*]

62. The Insurance Department's recognition that it is not actively supervising TIRSA's rate-setting activity is consistent with the April 2007 findings of the U.S. Government Accountability Office ("GAO") that the title insurance industry is in dire need of greater state regulation and oversight. The GAO studied the industry conditions of several states, including New York, and concluded that "state regulators have not collected the type of data, *primarily on title agents' costs and operations,* needed to analyze premium prices and underlying costs." (emphasis added)

63. To remedy this failing, the GAO has proposed, among other things: 1) strengthening the regulation of title agents through means such as establishing meaningful requirements of capitalization, licensing, and continuing education; and 2) improving the oversight of title agents through more detailed audits and the collection of data that would allow in-depth analyses of agents' costs and revenues.

64. The Insurance Department has recently tried to take its first steps in this direction of providing some active oversight by proposing legislation that would impose a licensing requirement on title agents. This legislation is currently pending before the New

York legislature. If enacted, it would bring title agents under the regulatory authority of the Insurance Department for the first time. This would seemingly provide some assistance in filling the regulatory vacuum that currently exists with regard to title agency costs.

65. However, even if the legislature expands the Insurance Department's authority in this way, this alone will not be enough to solve the problem. As the GAO report found, there are significant regulatory lapses even in those states that have licensing requirements for title agents:

> only two of the six regulators we reviewed collected financial and operational data on title agents, and regulatory officials in both those states said that the data that they currently collect was insufficient to analyze the appropriateness of [title] rates.

66. In any event, the Insurance Department's call for legislative assistance in regulating title agents and reviewing their agency commissions further highlights the fact that it currently has neither the authority nor the ability to properly assess defendants' collectively fixed rates.

67. Unchecked by regulatory review and insulated from competition, defendants have thus been able to collectively fix title insurance rates at supracompetitive levels and earn profits that vastly exceed those contemplated by the Insurance Department or that would have resulted in an open market.

E. Defendants' Inflated Rates and Excess Profits

68. At the time of TIRSA's formation, the Insurance Department established 5 percent (of the total premium) as the level of profit to which title insurers

are entitled. The Insurance Department is supposed to carefully analyze TIRSA's rate calculations, and in particular, its revenue and cost information, to ensure that this 5 percent profit level is maintained and based on a reasonable premium. However, without the authority or ability to scrutinize agency commission costs, the Insurance Department has been unable to perform this function. As a result, defendants (through TIRSA) have been able to set artificially high title premiums and secure title profits far in excess of the 5 percent threshold.

69. Through an independent investigation it conducted over the past several years, the New York State Attorney General confirmed defendants' excess profits in this regard. It found that for every dollar of insurance premium defendants collect, of the roughly 15 cents that supposedly accounts for the risk of loss, only 3 cents is paid out in claims. And, of the roughly 85 cents that supposedly covers agency commissions, only between 8 and 11 cents goes to costs actually incurred by title agents in producing the title policy. These numbers show that TIRSA's collectively fixed rates have resulted in profits that vastly exceed the 5 percent profit level the Insurance Department prescribed.

70. The Attorney General's investigation further revealed that what was largely driving these bloated numbers were the kickbacks and other financial inducements defendants were funneling to and through title agents to secure more business. As reported at the Insurance Department's 2006 hearing, one title agency's financial statements revealed that it spent more than $1 million of these so-called "agency commissions" on items identified as "Christmas," "automobile expenses," "political contributions,"

"promotional expenses," and "travel and entertainment." These expenses are not even remotely related to the issuance of title insurance.

71. As one Assistant Attorney General involved in the investigation explained at the hearing: "In essence, what is really happening is that the title insurance companies are paying the title agent for referring business to them." The Attorney General's office concluded that "all this excess money paid to the title agents by the title insurance company is a referral fee in violation of New York's Anti-kickback Law."

72. Numerous industry participants involved in the hearing corroborated the Attorney General's findings of rampant kickbacks and inflated premiums. As one title agent for defendant Chicago Title conceded: "Right now the title companies and some agents use the fees as a marketing tool to get business. Long gone are the days of a lunch and round of golf. Today it is 40, 50, 60, 70 percent of a title premium for little or no work being performed."

73. Another title agent for Chicago Title (as well as for defendants Fidelity Title, Ticor Title, First American Title, and Commonwealth) described the industry as having a "rampant culture of illegal kickbacks."

74. The former President of the New York State Land Title Association summed it up in this way. "Let's face it: there are no 'rules' governing title agencies in New York. Steering, kickbacks and referrals are open and notorious—often aided and abetted by underwriters [the title insurers]."

75. All of this "excess money" paid to title agents not only works to steer business to defendants. It also serves to boost defendants' own profits through

the inflated revenues they obtain to cover these agency payments and through their ownership or management stake in many of these agencies.

76. At the Insurance Department Hearing, the Assistant Attorney General rhetorically questioned how defendants could have accomplished such a regulatory run-around: "how could this happen . . . why [are] the title insurance companies and the title agents in New York able to reap such large profits?" The answer lies in defendants' scheme to set up a veritable "black box" of inflated costs and revenues into which the Insurance Department has neither the authority nor the ability to penetrate.

ANTICOMPETITIVE CONDUCT

77. Defendants are competitors in the sale of title insurance to consumers in New York. Through TIRSA, these title insurers have agreed and engaged in concerted efforts to (i) collectively set and charge uniform and supracompetitive rates for title insurance in New York, (ii) include in their calculated rates agency commission costs, (iii) embed within these costs payoffs, kickbacks, and other charges that are unrelated to the issuance of title insurance, and (iv) hide these supposed "costs" from regulatory scrutiny by funneling them to and through title agents which the Insurance Department has no ability or authority to regulate.

78. In the absence of proper regulatory authority and oversight, defendants' conduct constitutes a horizontal agreement to fix the form, structure, and prices of title insurance in New York and is a *per se* violation of Section 1 of the Sherman Act.

79. Defendants' price-fixing activity has been continuous throughout the relevant damages period and has been renewed and reinforced annually through TIRSA's submissions to the Insurance Department of supposed cost and revenue information and its periodic submissions of rate changes.

80. Through their collective price-fixing, deception, and manipulation of the regulatory process, defendants have harmed competition by charging consumers supracompetitive prices for title insurance in New York.

81. New York's title insurance rates are among the highest in the country. According to rate comparisons made by Bankrate.com, one of the country's leading aggregators of financial rate information, New York title rates (based on insuring a property with a $200,000 mortgage) are roughly 67 percent higher than the national average. The New York pricing gap is even greater relative to the significantly lower pricing of many of New York's Northeast neighbors including Massachusetts (70%), Maryland (76%), Vermont (81%), Delaware (83%), Maine (85%), Washington D.C. (87%), and New Hampshire (111%).

82. Defendant First American's own rate comparisons further confirm the vastly inflated title rates in New York compared to the rest of the country. First American's calculations (based on a $200,000 mortgage) show that New York title rates are roughly 45% higher than the national average. First American's calculations show that this gap is even greater—approaching or exceeding 100%—as compared to the rates for many of New York's neighbors (including Massachusetts, Maryland, Vermont, Maine and New Hampshire).

83. Absent defendants' anticompetitive and deceptive conduct, New York consumers would have paid significantly less for title insurance. These prices would have been more in line with the significantly lower prices charged by title insurers in these other states where the challenged price-fixing activity has not occurred.

CLASS ACTION ALLEGATIONS

84. Plaintiffs bring this action as a class action under Rule 23(b)(3) of the Federal Rules of Civil Procedure for violations of Section 1 of the Sherman Act, 15 U.S.C. § 1, New York Business Law § 349, and the common law. The Rule (b)(3) Class is comprised of all consumers who purchased title insurance in New York from defendants or TIRSA's other members during the fullest period permitted by the applicable statute of limitations.

85. Plaintiffs, along with all other members of the Rule (b)(3) Class, were injured as a result of paying supracompetitive prices for title insurance in New York. These supracompetitive prices were achieved as a result of defendants' anticompetitive, deceptive, and otherwise unlawful conduct. Defendants are jointly and severally liable for the illegal price-fixing activities of all members of TIRSA.

86. Members of the (b)(3) Class include hundreds of thousands, if not millions, of consumers. They are so numerous that their joinder would be impracticable.

87. Plaintiffs also bring this action as a class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure, for violations of Section 1 of the Sherman Act, 15 U.S.C. § 1 and Section 349 of New York's General Business Law. The Rule (b)(2) Class

includes all members of the (b)(3) Class, and all consumers who are threatened with injury by the anticompetitive and deceptive conduct detailed herein.

88. Defendants have acted, continued to act, refused to act and continued to refuse to act on grounds generally applicable to the Rule (b)(2) Class, thereby making appropriate final injunctive relief with respect to the Rule (b)(2) Class as a whole.

89. Members of the Rule (b)(2) Class include hundreds of thousands, if not millions, of consumers. They are so numerous that their joinder would be impracticable.

90. Common questions of law and fact exist with respect to all Class members and predominate over any questions solely affecting individual Class members. Among the questions of law or fact common to the class are the following:

- Whether defendants have engaged in the alleged illegal price-fixing activity.
- The duration and scope of defendants' alleged illegal price-fixing activity.
- Whether defendants' alleged illegal price-fixing has caused higher prices to plaintiffs and other purchasers of title insurance in New York.
- Whether the Insurance Department has actively supervised defendants' collective rate-setting activity.
- Whether defendants have engaged in the alleged consumer-oriented deceptive conduct.

91. Plaintiffs do not have any conflict of interest with other Class members. Their claims are typical of the claims of the Class and they will fairly and adequately reflect the interests of the Class. Counsel competent and experienced in federal class action and federal antitrust litigation has been retained to represent the Class.

92. This action is superior to any other method for the fair and efficient adjudication of this legal dispute since joinder of all members is not only impracticable, but impossible. The damages suffered by certain members of the Class are small in relation to the expense and burden of individual litigation and therefore it is highly impractical for such Class members to seek redress for damages resulting from defendants' anticompetitive and deceptive conduct.

93. The prosecution of separate actions by individual Class members would also impose heavy burdens upon the courts and defendants, and would create a risk of inconsistent or varying adjudications of the question of law and fact common to the class. A class action, on the other hand, would achieve substantial economies of time, effort and expense, and would assure uniformity of decision as to persons similarly situated without sacrificing procedural fairness or bringing about other undesirable results.

94. There will be no extraordinary difficulty in the management of the class action.

CLAIMS FOR RELIEF

First Claim for Relief

(Sherman Act Section I - Horizontal Price-Fixing)

95. Plaintiffs repeat and reallege each and every allegation of this complaint as if fully set forth herein.

96. Defendants have entered into a continuing illegal contract, combination, or conspiracy in restraint of trade, the purpose and effect of which is to fix and maintain supracompetitive prices to consumers for title insurance in New York. This contract, combination, and conspiracy is illegal *per se* under Section 1 of the Sherman Act, 15 U.S.C. § 1.

97. Defendants' contract, combination, or conspiracy is comprised of defendants' efforts and agreement to (i) collectively fix uniform and supracompetitive rates for title insurance in New York, (ii) include in their calculated rates agency commission costs, (iii) embed within these costs payoffs, kickbacks, and other charges to title agents that are unrelated to the issuance of title insurance, and (iv) hide these supposed costs from regulatory scrutiny by funneling them to and through title agents.

98. Defendants' contract, combination, or conspiracy has caused substantial anticompetitive effects in the title insurance market. It has done so by causing plaintiffs, and other purchasers of title insurance in New York, to pay significantly more for title insurance than they would have in the absence of defendants' illegal activity.

99. As a result of these violations of Section 1 of the Sherman Act, plaintiffs and the purported Class have been injured in their business and property in

an amount not presently known, but which is, at a minimum, hundreds of millions of dollars, prior to trebling.

100. Such violations and the effects thereof are continuing and will continue unless injunctive relief is granted. Plaintiffs have no adequate remedy at law.

Second Claim for Relief

(New York Gen. Bus. Law § 349)

101. Plaintiffs repeat and reallege each and every allegation of this complaint as if fully set forth herein.

102. Defendants' efforts to conceal the artificially high cost basis for their collectively fixed title insurance premiums by (i) including unregulated and unauthorized costs in these premiums, and (ii) embedding these supposed costs within the agency commissions paid to title agents who are not subject to regulatory review, constitute materially misleading and deceptive consumer-oriented acts and practices in the conduct of a business trade or commerce and in the furnishing of a service in New York, within the meaning of New York General Business Law § 349.

103. Plaintiffs and the Class have been injured as the direct and proximate result of defendants' deceptive and misleading acts and practices. Through this conduct, defendants have been able to escape regulatory oversight and thereby collectively set supracompetitive prices for title insurance premiums in New York.

104. Defendants' deceptive and misleading acts and practices have had a broad impact on, and have caused substantial injuries to, consumers in New York.

105. Without prejudice to their contention that defendants' unlawful conduct was willing and knowing, plaintiffs and the Class do not seek at this time to have those damages trebled pursuant to New York General Business Law § 349(h).

Third Claim for Relief

(Unjust Enrichment)

106. Plaintiffs repeat and reallege each and every allegation of this complaint as if fully set forth herein.

107. Defendants have been unjustly enriched through the overpayments they have caused plaintiffs and the Class to pay for title insurance in New York.

108. Plaintiffs and the Class are entitled to have returned to each of them the amount of these overpayments as damages or restitution.

RELIEF SOUGHT

WHEREFORE, the plaintiffs and the Class request the following relief:

A. That the Court declare, adjudge, and decree that defendants have committed the violations of federal, New York state and common law alleged herein;

B. That defendants, their directors, officers, employees, agents, successors, and assigns be permanently enjoined and restrained from, in any manner, directly or indirectly (i) unlaw-

fully fixing their New York title insurance rates, and committing any other violations of Section 1 of the Sherman Act or of other statutes having a similar purpose and effect, and (ii) engaging in any deceptive acts or practices in the setting of New York title insurance rates, and committing any other violations of New York General Business Law § 349 or of other statutes having a similar purpose and effect;

C. That the Court award damages sustained by plaintiffs and the Class from defendants' violations of Section 1 of the Sherman Act in an amount to be proven at trial, to be trebled according to law, plus interest (including prejudgment interest), to compensate them for the overcharges they incurred;

D. That the Court award actual damages sustained by plaintiffs and the Class from defendants' violations of New York General Business Law § 349 in an amount to be determined at trial. Plaintiffs and the Class do not seek treble damages under New York General Business Law § 349.

E. That the Court return to plaintiffs and the Class all overpayments they made to, and which have unjustly enriched, defendants; and

F. That the Court award plaintiffs and the Class attorneys' fees and costs of suit, and such other and further relief as the Court may deem just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs demand a trial by jury of all issues triable by jury.

DATED: July 11, 2008

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APPENDIX M

NEW YORK STATE INSURANCE DEPARTMENT

TITLE INSURANCE

MEMORANDUM DECISION & OPINION

Title insurance at some point touches most people's lives. When it does, title insurance often touches nerves beyond the title community—in the real estate industry, with lenders issuing mortgages and, in particular, among consumers trying to buy or sell a home or other real estate. For the most part, transfers in this State of real property interests, whether commercial or residential, simply cannot close without title insurance.

Given its impact on so many private interests, upon transfers of high significance to the parties involved, the proper functioning of title insurance and its sound regulation become vital to the public interest. At times richly criticized, title insurance is poorly understood.

The Insurance Department held a public hearing on February 13, 1991 in order to gather intelligence and elicit insights from experts and interested parties concerning the title insurance industry in New York—especially in light of changing practices, deteriorating loss experience, real estate market downturn, decline in closings, and recession in the overall economy. The Insurance Department also conducted market surveys of the title insurance industry, in a systematic effort to identify key information, developments and trends about underwriting, pricing and other market practices. In addition Insurance Department staff have held many meet-

ings with various parties on a wide range of title insurance issues.

Numerous parties, representing multiple perspectives in the title insurance and related lending communities (including savings banks, mortgage banks, and life insurers), participated in our fact-finding process and at the public hearing. In particular, the hearing focused on several specific issues:

A. Policy Forms. The Insurance Department has received proposals from title insurers that would exclude creditors' rights from the scope of a title insurance policy, on the grounds that such creditors' rights represent substantial unanticipated exposures inappropriate to title insurance. The following language to exclude creditors' rights was proposed: "any claim, which arises out of the transaction creating the interest of the mortgagee insured by this (loan) policy (owners policy: "vesting in the insured the estate or interest insured"), by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws."

What are the implications of this proposal? Should such an exclusion be required or allowed for use in New York? If so, is it overbroad?

The Insurance Department has also received policy form submissions seeking to authorize use of a modernized title insurance policy form and, in the process, to disallow for future use in this State various title insurance policy forms that have been in use over the last fifty years. Should these different forms over the years be replaced for future application with a modem title insurance policy form?

B. Advisory Rate Service Organization. There have been no title insurance rate adjustments or industry-wide statistical complication since 1983 in this State. Should the Insurance Department, as a matter of state action, direct or authorize title insurers in New York to establish a title-specific advisory rate service organization in order to collect credible data and file supportable rates?

What are the implications for solvency? What would be the impact on competition? What about the effects on consumers?

C. Title Agents. New York is one of the few jurisdictions where title insurance agents are not licensed. At closings, title agents are entrusted with sizeable sums of money, not simply title insurance premiums, but monies for mortgage recording tax, transfer tax, recording fees, and escrow deposits of all kinds. In recent years, New York has experienced a proliferation of title agents, while the incidence of defalcations by title agents has risen. The quality of title searches, given almost a doubling in paid losses over the latest three-year period, has also become suspect.

Licensing would require legislative action. Should title agents be licensed? If so, should some types of title agents (e.g., attorneys) be exempt from licensing or receive differentiated treatment?

What credentials should a professional title insurance agent possess? What responsibilities do title insurers have in appointing title agents? How well have title insurers carried out their

responsibilities? What roles are played by title agents in abstracting, underwriting and claims-handling? What contribution have title agents made in regard to creating or preventing title insurance claims and losses?

When using title agents, the title underwriter receives but a minor fraction of the title insurance premium. Most of that premium is retained by the agent. What other fees are charged? What other services are performed? Is title agent remuneration properly structured?

How does the title insurance premium split between insurer and agent impinge upon rates and solvency? Does the split make sense? Is it fair?

Even after the comprehensive evaluation of title insurance conducted by the Insurance Department, this Memorandum Decision & Opinion cannot answer all these questions at this time. Rather, the effort now is to discern the best responses to critical issues, as a predicate for systematic action in the future.

BACKGROUND

Title insurance, principally governed by Article 64 of the Insurance Law, differs in a number of real respects from most other types of insurance:

(1) Other forms of insurance typically protect against loss due to future contingencies, while title insurance generally involves analysis and acceptance of risks already past and still present. Other insurance underwriters are primarily concerned with the probability of loss based on the potential

risk's characteristics. Title underwriters seek to reduce and, indeed, eliminate the possibility of loss through thorough evaluation of the transactional history of a particular property.

(2) Premium for other lines of business is typically paid for each period of coverage, while the title premium is paid once, at the time the policy is issued.

(3) Except that it effectively terminates when the property is next sold, title policies have no termination date and no limitation on dates for filing of claims.

(4) Title losses consume a much smaller portion of the total premium than in other lines. In an effort to achieve "zero loss" underwriting, the major part of the title insurance premium is dedicated to loss detection and prevention costs, such as acquisition and maintenance of title plants, searches, underwriting, legal fees, and salaries.

(5) Title insurers may write business directly through local offices but, to a large extent, now operate through local agents who perform the crucial title search, examination, clearance and closing functions. Due to these additional responsibilities, title insurance agents usually receive a significantly higher commission rate than other types of property/casualty insurance agents.

(6) Given the major roles they play, title insurance agents tend to dominate the business. Title insurance is subject to "reverse competition": business gravitates to title insurers

that pay agents the most generous commissions. Were an individual title insurer to reduce its commission rates, it would run the real risk of quickly losing better business and market share.

(7) Title insurers must be structured and operated on a monoline basis, and so cannot write any other kind of insurance.

(8) Title insurance is not covered by any of New York's guaranty funds that protect policyholders and claimants in the event of insurer insolvency. No title insurer in New York has ever become insolvent.

By providing protection and security for real property transfers, the title insurance industry plays a critical role in supporting a vigorous real estate market and vital economy in New York. Title insurance premiums written in New York State for 1990 totaled $251,222,000, down more than 30% from a high of $361,324,000 in 1987, largely reflecting the recent decline in real estate sales and values. See Exhibit (title insurance premium and loss history). Overall incurred loss ratio for title insurance has climbed from the historical 5% level in 1988 to 15% in 1990, while paid losses nearly doubled over the same period.

Title insurance protects many segments of society—from first-time home buyers to purchasers of multi-million dollar commercial properties. Even when the buyer has complete confidence in clear title and so believes title insurance is unnecessary to consummate the transfer, the mortgage lender typically insists upon title insurance.

Thus title insurance can protect both purchasing and lending parties in a real estate transaction against potential financial loss due to a defect in the title or an encumbrance on the property:

(1) The title loan (or mortgage) policy protects the lender by helping to secure its position, facilitates the flow of mortgage funds, and enables mortgage securitization; and

(2) The title owners (or fee) policy protects the buyer, although the buyer pays for both fee and mortgage policies in the vast majority of transactions.

From analysis of public hearing testimony, market survey data, and other pertinent information, the determinations that follow have been made.

A. POLICY FORMS.

Over the years, a practice has developed where different lenders require different editions of title insurance policy forms that, despite variations, are essentially the same in scope and coverage. Pursuant to Section 6409 of the Insurance Law, title insurers filed the 1990 editions of standard policy forms developed by the American Land Title Association (ALTA). Title insurers also urge that all policy forms on file and outstanding at this time be disallowed for future issue and discontinued in favor of the 1990 ALTA forms.

This approach is sound, because it will:

(a) achieve better comparability and uniformity, and eliminate confusion;

(b) modernize the language of the standard title insurance fee and mortgage policies, making

them more understandable without reducing coverage; and

(c) facilitate pooling and securitization of mortgages for distribution in the secondary market.

Therefore, for purposes of future application in real estate transactions commencing January 1, 1992, all title insurance policies previously on file and in use shall no longer be used in this State, namely:

1. American Title Association (later ALTA) 1946 policy;
2. New York Board of Title Underwriters (NYBTU) Form 100;
3. ALTA Loan Policy (10-21-87); and
4. ALTA Owners Policy (10-21-87).

The Insurance Department authorizes the filed 1990 ALTA forms and directs their exclusive use in all title insurance policies issued on and after January 1, 1992.

Quite apart from our February 13, 1991 public hearing, title insurers have waived their right to a hearing under Section 3110 of the Insurance Law with respect to the withdrawal from use of the cited policy forms. Continued use of these older forms would be misleading and against public policy, given acceptability for use of the modernized 1990 ALTA title insurance loan and owners policy forms (04-06-90)—as to which no problems have been noted and no objections lodged.

In contrast, objections were made to the sweep of the proposed creditors' rights exclusion. In view of testimony received and contemporary complexity of corporate deals such as leveraged buy-outs, mergers and acquisitions, and tender offers—often involving

and impacting real estate transactions—the Insurance Department has determined that a creditors' rights exclusion is appropriate and should be included in title insurance policies. Title insurance was never intended to cover these phenomena. Unrequited creditors of a real estate seller or buyer should not be able to claim against title insurance.

The risks may well be real that one or more of the parties to a real estate transaction may be or might become bankrupt or otherwise financially disabled, possibly transforming the transfer into a fraudulent conveyance or making its validity susceptible to attack as preferential. However, risks of this nature are basically outside the purpose and scope of title insurance and, as a practical matter, fall beyond the competence of title insurance underwriters, who lack expertise as well as timely, complete information, to gainsay.

At the same time, we are persuaded that the proposed creditor's rights exclusion is unnecessarily overbroad in language and, as such, could effectively carve-out traditional title insurance responsibilities as to even mundane credit-related issues. Because we are also convinced that the legitimate concerns of the title and lending communities can and must be reconciled, while always protecting the interests of consumers buying and selling real estate, the Insurance Department encouraged representatives of these complementary title and lending industries to discuss the matter and reach a workable exclusion.

As a result, revised language for a creditors' rights exclusion has been developed; should be compared with the original proposal, as recited at the outset of this Memorandum Decision & Opinion; and, so that the policy from is neither misleading nor against

public policy, shall be incorporated into the 1990 ALTA title insurance policy forms used in this State, at the least by way of New York endorsement.

Excluded from title insurance coverage, under the loan or mortgage policy protecting the lender, is:

> Any claim, which arises out of the transaction creating the interest of the mortgagee insured by this policy, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that is based on:
>
> (1) the transaction creating the interest of the insured mortgagee being deemed a fraudulent conveyance or fraudulent transfer;
>
> (2) the subordination of the interest of the insured mortgagee as a result of the application of the doctrine of equitable subordination; or
>
> (3) the transaction creating the interest of the insured mortgagee being deemed a preferential transfer, except where the preferential transfer results from the failure:
>
> (i) to timely record the instrument of transfer; or
>
> (ii) of such recordation to impart notice to a purchaser for value or a judgment or lien creditor.

Excluded from title insurance coverage, under the owners or fee policy protecting the real estate buyer, is:

> Any claim, which arises out of the transaction vesting in the insured the estate or interest insured by this policy, by reason of the operation

of federal bankruptcy, state insolvency, or similar creditors' rights laws, that is based on:

(1) the transaction creating the estate or interest insured by this policy being deemed a fraudulent conveyance or fraudulent transfer; or

(2) the transaction creating the estate or interest insured by this policy being deemed a preferential transfer, except where the preferential transfer results from the failure:

(i) to timely record the instrument of transfer; or

(ii) of such recordation to impart notice to a purchaser for value or a judgment or lien creditor.

New York mandatory endorsements so providing are hereby accepted and required for use in this State. While our determination applies only in New York, we believe that these refined creditors' rights exclusions would make sense whenever and wherever title insurers use 1990 ALTA title insurance policy forms in the future.

B. TITLE ADVISORY RATE SERVICE ORGANIZATION.

From 1917 through 1985, the New York Board of Title Underwriters (NYBTU) operated as a voluntary non-profit advisory rate service organization, which collected industry-wide statistical data and, from time to time, filed rates and forms on an advisory basis with the Insurance Department.

On September 4, 1985, NYBTU surrendered its license to the Insurance Department and dissolved. Dissolution was evidently a reaction to an adminis-

trative complaint lodged by the Federal Trade Commission (FTC) against certain title insurers and title insurance rating practices in six other states. The FTC complaint apparently relied in part upon narrow construction of the limited antitrust exemption accorded the "business of insurance" under the McCarran-Ferguson Act. *See Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119 (1982); and *Group Life & Health Insurance Co. v. Royal Drug*, 440 U.S. 205 (1979).

Recently, in a case instituted as a result of the FTC complaint, *Ticor Title Insurance Co. v. Federal Trade Commission*, 922 F.2d 1122 (3d Cir.), *cert. granted*, 116 L.Ed.2d 25 (1991), the United States Court of Appeals for the Third Circuit vacated a final order of the FTC, which ruled that the collective agreement of five title insurers to set rates for title search and examination services in six states constituted antitrust violations. The Third Circuit Court of Appeals ruled that, under the "state action doctrine", collective setting of title insurance rates is exempt from federal antitrust prohibitions, if specifically authorized by state statute and regulated by state insurance departments. On October 7, 1991, the United States Supreme Court granted an appeal in *Ticor v. FTC*.

It is significant that the FTC chose not to include New York in its complaint, following analysis of the operations of NYBTU and its member companies and recognizing active regulation by this Insurance Department. One of the express purposes of Article 23 of the New York Insurance Law is to authorize and regulate cooperative action among insurers within the scope of the Article. Article 23 requires that title insurance rates be prior approved by the

Superintendent. Title insurers must also file all policy forms with the Superintendent. In addition, the Superintendent is required to examine the affairs of a title insurer at least once every three years, which may be extended to no more than five years, and of every rate service organization at least once every five years.

Our public hearing and market survey—culminating in this Memorandum Decision & Opinion—underscore and characterize the active regulatory role concerning title insurance carried out by the New York State Insurance Department.

The title insurance industry throughout much of the nation, including New York, has demonstrated itself generally unable to act during pendency of the FTC action—even though New York was never among the states involved in that proceeding. Since well before NYBTU dissolution, there have been no title insurance rate filings or adjustments, and no title industry-wide statistical data have been compiled. Nor have individual insurers, which were NYBTU members or subscribers, filed rate applications or statistical reports.

In order to evaluate the status and condition of the title insurance industry, the Department requested, on April 6, 1990 and November 1, 1990, specific data from all 17 title companies licensed to write in New York, pursuant to Section 308 of the Insurance Law. Certain data were also sought from the five largest agents of each title insurer. All 17 insurers, but only 12 agents, responded.

Based upon market survey data as well as testimony at the public hearing, there is abundant need for resumption of industry-wide compilation of title

insurance data for analysis, ratemaking and regulatory purposes. Absent access to and analysis of industry-wide data on a systematic basis, it is difficult to evaluate the extent to which title insurance rate levels comply with Article 23 standards.

Up-to-date title insurance industry information becomes more and more important with the passage of time and events. Even though title insurance rates have not increased for many years, title insurance rates and ensuing premiums are functions of the transferred real property's value. During the 1980s, the size and number of real estate transactions increased, but so far in the 1990s, the pace as well as dimensions of deals have diminished, if not dwindled, while title insurance claims and losses have jumped.

Against the emerging concern that title insurance premiums may be inadequate, in view of the need of title insurers to reserve, pay or defend in regard to rising claims, is the lingering concern voiced by consumers that title insurance premium charges are excessive. Scrutiny of industry-wide data, yet to be compiled, is required to truly determine whether title insurance rates are too low or too high.

In addition, Section 2313 of the Insurance Law:

(a) defines a rate service organization;

(b) requires that no insurer may utilize its services unless it is licensed by the Superintendent; and

(c) sets the parameters within which a rate service organization must operate.

While Section 2313 does not empower the Superintendent to mandate that a rate service organization be established, the Superintendent is authorized to

approve and regulate its licensing and operation. On August 7, 1991, following discussions of relevant considerations with the Department, the Insurance Department received an application to license the Title Insurance Rate Service Association (TIRSA) as a Section 2313 advisory rate service organization for title insurance purposes.

After the Department's review of this application, TIRSA is hereby approved under Section 2313 as a rate service organization and, pursuant to Section 2315, designated as the Department's statistical agent for title insurance in this State. Upon licensing, TIRSA will serve in an advisory capacity only in regard to title insurance rates and forms on behalf of its members. While all title insurers must report statistics to TIRSA, every licensed title insurer may file for title insurance rates above or below the advisory rate level, if such differences can be justified.

Given the extreme importance of expenses in the realm of title insurance, we contemplate title insurance filings on a full rate, and not a loss cost only, basis in Now York State. Given the peculiar nature of tide insurance, TIRSA shall maintain statistics that track losses as well as expenses with specificity, segregated on an industry aggregate as well as individual insurer basis. In conjunction with TIRSA, the Insurance Department will consider what basic rate methodology is optimal to ensure equitable premium allocation and to minimize controlled business abuses in regard to title insurance.

Existence of TIRSA as a licensed advisory rate organization in New York for title insurance purposes will, in turn, facilitate statistical compilation with rapidity and integrity. Statistical data submitted in a correct and consistent format will help the Insur-

ance Department evaluate industry-wide experience of title insurance, and also the appropriateness of the premium split between title insurer and title agent.

After analysis of information from the market survey and public hearing, we believe that, with a designated statistical agent and advisory rate organization in operation in the future, fair pricing in the title insurance industry will be enhanced and consumer protection elevated. This mechanism will heighten title insurance accountability and strengthen regulatory oversight. We reach these conclusions after thorough consideration of competitive concerns and controversies raised, in Washington, D.C. and elsewhere, in connection with title insurance specifically and insurance generally.

C. TITLE AGENTS.

In view of the reverse competitive pressures endemic to the title insurance business and this industry's extremely high proportion of expenses—particularly agent commissions—we believe that legislative action is also warranted to: (a) license title insurance agents; (2) help address the title insurance premium split; and (3) deal with controlled business problems.

A title insurance agent is any person, firm or corporation authorized by a licensed title insurance company to perform, and who actually performs, the following acts:

(1) issues commitments to insure title, or reports of title, based upon a search or an examination of title;

(2) determines insurability in accordance with underwriting rules and standards prescribed by the title insurance company; or

(3) performs in substantial part the following functions:

(i) collects premiums and other funds;
(ii) closes, clears or settles title; or
(iii) records closing documents

Public hearing speakers, including title agents, were unanimous in advocating that title insurance agents should be licensed by the Insurance Department. Lawyers belonging to the Title Insurance Bar Association at a subsequent meeting contend that there is no need to license as title insurance agents those attorneys who specialize in real estate law and title matters. Even they concede that the many attorneys who occasionally act as title insurance agents are far from experts on vital title insurance issues and developments.

Title insurers have reportedly experienced increases in the number and severity of agent defalcations in recent years. Given authority to discipline and remove the license of any agent who violates the Insurance Law or proves otherwise untrustworthy, licensing should reduce the incidence of fraud.

Licensing would add to the knowledge and elevate the professionalism of title agents and help reduce controlled business abuses, where a lender directs business to affiliated title agencies. Licensing title agents will enable the Insurance Department to obtain the information necessary to regulate appropriately all major facets of the title insurance industry. As noted, only 12 (out of a possible 85 "top 5") agents responded to the Department's request for data.

Accordingly, the Department intends to seek or support legislation to license all title insurance

agents (including attorneys occasionally acting as title agents) upon: (a) demonstrating financial responsibility; (b) completing specified classroom work; and (c) passing a customized examination emphasizing proficiency, probity and professionalism. (Attorneys with requisite expertise and experience might be exempt.)

A major concern to the Insurance Department is whether apportionment of the premium between title insurer and title agent is warranted. The bulk of the premium paid at closing is retained by the title agent—typically 80% regardless of transaction size. Perhaps agent commissions should be paid on a sliding scale, as the title insurance rate itself already is, getting smaller in percentage as the deal grows larger in dimensions. Our market survey reveals title insurer costs of direct writing that seem to be significantly unde. the costs of writing through agents, below the sizeable proportion of the premium retained by the agent. It also appears from our market survey that claims and losses turn out to be higher when title agents have been utilized, compared to direct writing experience.

At the same time, some title insurers have been lax in selecting and policing title agents. Incompetent and, worse, unscrupulous title agents dismissed by one title insurer are apt to be quickly appointed by another title insurer, despite notice of the agent's lack of competence or scruples. Via forthcoming administrative action, the Insurance Department will insist that title insurers licensed in this State raise their standards and vigilance.

Elevated standards will be in the best interests of the many responsible title insurers and agents whose reputations and business are injured by the relatively

few irresponsible players in the title insurance community. An enlightened title insurance community should understand that this Department will neither approve nor tolerate title insurance costs or rates attributable to laxity by title insurers or due to cupidity on the part of title agents.

Working together with responsible title insurers and agents, these actions and measures should stimulate the title insurance industry and, in turn, invigorate public confidence in title insurance.

RICHARD C. HSIA
DEPUTY SUPERINTENDENT

Dated: November 19, 1991

SALVATORE R. CURIALE
SUPERINTENDENT OF INSURANCE

(2)

No. 10-53

IN THE

Supreme Court of the United States

BRENDAN DOLAN, *et al.*,

Petitioners,

v.

FIDELITY NATIONAL TITLE INSURANCE COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioners have presented compelling reasons to grant the Petition where the Second Circuit's summary order applied the well-established filed rate doctrine to bar Petitioners' challenge to title insurance rates filed with and approved by the New York State Insurance Department.

CORPORATE DISCLOSURE STATEMENT

Counsel for Respondents Fidelity National Financial, Inc., Fidelity National Title Insurance Company, Chicago Title Insurance Company, Ticor Title Insurance Company, Commonwealth Land Title Insurance Company, and Lawyers Title Insurance Corporation certify that:

- Fidelity National Financial, Inc. is a publicly traded corporation. No publicly held corporation owns 10% or more of Fidelity National Financial, Inc.'s stock.

- Fidelity National Financial, Inc. is the parent corporation of the wholly-owned subsidiary Fidelity National Title Group, Inc.

- Fidelity National Title Group, Inc. is the parent corporation of the wholly-owned subsidiary Chicago Title and Trust Company.

- Chicago Title and Trust Company is the parent corporation of the following wholly-owned subsidiaries: Fidelity National Title Insurance Company and Chicago Title Insurance Company.

- Ticor Title Insurance Company has merged into Chicago Title Insurance Company.

- Lawyers Title Insurance Corporation has merged into Fidelity National Title Insurance Company.

- Chicago Title Insurance Company is the parent corporation of Commonwealth Land Title Insurance Company, a wholly-owned subsidiary.

Counsel for Respondents The First American Corporation, First American Title Insurance Company of New York, and United General Title Insurance Company certify that:

- The First American Corporation was a publicly traded corporation. The First American Corporation is now known as CoreLogic, Inc. No publicly held corporation owns 10% or more of CoreLogic, Inc.'s stock.

- First American Title Insurance Company of New York and United General Title Insurance Company are wholly-owned subsidiaries of First American Title Insurance Company, which in turn is a wholly-owned subsidiary of First American Financial Corporation. First American Financial Corporation is a publicly traded corporation, and no public company owns 10% or more of First American Financial Corporation's stock.

Counsel for Respondents Stewart Information Services Corporation, Stewart Title Insurance Company, Stewart Title Guaranty Company, and Monroe Title Insurance Corporation certify that:

- Stewart Information Services Corporation is a publicly traded corporation. No publicly held corporation owns 10% or more of Stewart Information Services Corporation's stock other than Wells Fargo & Company and its subsidiaries.

- Stewart Title Guaranty Company is a wholly owned subsidiary of Stewart Information Services Corporation.

- Stewart Title Insurance Company and Monroe Title Insurance Corporation are indirectly wholly owned by Stewart Information Services Corporation.

Counsel for Respondent Title Insurance Rate Service Association, Inc. certify that:

- Title Insurance Rate Service Association, Inc. is a New York not-for-profit corporation and has no corporate parents, subsidiaries or affiliates that are publicly held.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	v
TABLE OF CITED AUTHORITIES	vii
INTRODUCTION	1
COUNTERSTATEMENT OF THE CASE	3
A. The New York State Insurance Department Sets Title Insurance Rates Pursuant to a Legislatively Adopted Regulatory Scheme	3
B. Every TIRSA Rate Filing That Went Into Effect Was Reviewed And Approved By The New York State Insurance Department	6
C. Petitioners' Complaint Seeks Damages For Alleged "Overcharges" And "Overpayments"	7
D. The Second Circuit Applied The Filed Rate Doctrine To Affirm Dismissal of Petitioners' Complaint In Its Entirety And With Prejudice	8

Contents

Page

REASONS FOR DENYING THE PETITION ... 9

I. THIS CASE FALLS SQUARELY WITHIN THE WELL-ESTABLISHED CONTOURS OF THE FILED RATE DOCTRINE 9

II. CONTRARY TO PETITIONERS' CONTENTION, DISMISSAL OF THIS CASE DOES NOT INVOLVE AN EXPANSION OF THE FILED RATE DOCTRINE 16

III. PETITIONERS ATTEMPT TO CONCOCT A CIRCUIT SPLIT THAT DOES NOT EXIST 21

CONCLUSION 26

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Page

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Page

Excellus Health Plan, Inc. v. Serio, 809 N.E.2d 651 (N.Y. 2004) 21

Fax Telecommunicaciones Inc. v. AT&T, 138 F.3d 479 (2d Cir. 1998) 13

H.J. Inc. v. Nw. Bell Tel. Co., 954 F.2d 485 (8th Cir. 1992) 10

In re Empire Blue Cross & Blue Shield Customer Litig., 622 N.Y.S.2d 843 (N.Y. Sup. Ct. 1994) 21

In re N.J. Title Ins. Litig., No. 08-1425, 2009 WL 3233529 (D.N.J. Oct. 5, 2009) 15, 25

In re Penn. Title Ins. Antitrust Litig., 648 F. Supp. 2d 663 (E.D. Pa. 2009) 15, 25

In re Title Ins. Antitrust Cases, No. 1:08CV677, 2010 WL 1267129 (N.D. Ohio Mar. 31, 2010) 15, 25

In re Trans Alaska Pipeline Rate Cases, 436 U.S. 631 (1978) 2, 19, 20

Interstate Commerce Comm. v. Transcon Lines, 513 U.S. 138 (1995) 22

Cited Authorities

Page

Keogh v. Chicago & Nw. Ry. Co., 260 U.S. 156 (1922) 9, 13

Kramer v. Time Warner Inc., 937 F.2d 767 (2d Cir. 1991) 7

Maislin Indus. U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990) 13, 16

McCray v. Fid. Nat'l Title Ins. Co., 636 F. Supp. 2d 322 (D. Del. 2009) 15, 25

MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218 (1994) 11, 15

Reiter v. Cooper, 507 U.S. 258 (1993) 20

Sea-Land Servs., Inc. v. Danzig, 211 F.3d 1373 (Fed. Cir. 2000) 22

Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409 (1986) ... 11, 13, 14, 15

Taffet v. Southern Co., 967 F.2d 1483 (11th Cir. 1992) 10

Tex. Commercial Energy v. TXU Energy, Inc., 413 F.3d 503 (5th Cir. 2005) 9, 15

TON Services, Inc. v. Qwest Corp., 493 F.3d 1225 (10th Cir. 2007) 23

Cited Authorities

	Page
Utilimax.com, Inc. v. PPL Energy Plus, LLC, 378 F.3d 303 (3d Cir. 2004)	10
Wah Chang v. Duke Energy Trading & Mktg., LLC, 507 F.3d 1222 (9th Cir. 2007)	10
Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17 (2d Cir. 1994)	9, 10
Winn v. Alamo Title Ins. Co., No. A-09-CA-214-SS, 2010 WL 2102332 (W.D. Tex. May 14, 2009), *aff'd*, No. 09-50511, 2010 WL 1286890 (5th Cir. Mar. 30, 2010)	14, 24

Statutes and Rules

N.Y. C.P.L.R. 7803	21
N.Y. Ins. Law § 2301	3, 5, 17
N.Y. Ins. Law § 2304	5
N.Y. Ins. Law § 2305	3, 4, 5, 7
N.Y. Ins. Law § 2313	4
N.Y. Ins. Law § 2315	5
N.Y. Ins. Law § 6409	4, 5
Sup. Ct. R. 10	1

Page

Other Authorities

IA PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW (3d ed. 2006) 9

INTRODUCTION

Petitioners seek review of the Second Circuit's summary order affirming the Eastern District of New York's dismissal of their Consolidated Class Action Complaint. The complaint alleges that Respondents – title insurance companies, their corporate parents, and the Title Insurance Rate Service Association, Inc. ("TIRSA") – conspired to fix title insurance rates in New York in violation of the Sherman Act and New York state law. TIRSA, a state licensed rate service organization, files proposed rates with the Insurance Department on behalf of its title insurer members. Once title insurance rates are approved by the Insurance Department, they are the only rates New York law permits Respondents to charge. The Second Circuit determined, in an unpublished summary order in line with nearly a century of this Court's case law and the decisions of other circuit courts across the country, that the filed rate doctrine bars claims such as Petitioners' challenging the reasonableness of these rates.

Petitioners have presented no "compelling reasons" for their Petition for a Writ of *Certiorari* (the "Petition") to be granted. Sup. Ct. R. 10. Petitioners fail to demonstrate that the Second Circuit's decision conflicts with a decision of this Court or any circuit court, or that the Second Circuit decided an important federal question that has not been settled by this Court. Sup. Ct. R. 10(a), (c). In fact, the decision below follows settled filed rate doctrine law from this Court and accords with the decisions of other circuit courts and five other district courts in parallel litigation brought in other states. Petitioners' complaint is nothing more

than an impermissible request for a federal district court to inject itself into New York's title insurance regulatory framework in order to replace the Insurance Department's judgment about title insurance rates in New York with the court's judgment. This request is precisely what this Court and the circuit courts have repeatedly held to be prohibited by the filed rate doctrine.

In an attempt to repackage the arguments rejected by the district court and the Second Circuit, Petitioners focus their Petition and question presented on a footnote in *In re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631 (1978). While the Petition accuses the Second Circuit of "sidestep[ping]" the *Trans Alaska* case, Petition at 9, Petitioners cited it just two times in passing in almost 100 pages of briefing to the district court and the Second Circuit. In any event, *Trans Alaska* does not address the filed rate doctrine. It does, however, recognize that "federal courts have no power to make 'an independent appraisal of the reasonableness of rates,'" 436 U.S. at 638 n.17 (internal citation omitted), which is precisely what Petitioners seek in this case.

Petitioners also attempt to create the appearance of a circuit split where none exists. As set forth *infra*, all of the cases Petitioners cite in support of their supposed circuit split either have no bearing on the application of the filed rate doctrine in this case or are in complete harmony with the Second Circuit's summary order. Indeed, Petitioners ignore the numerous cases that have been decided by federal courts across the country – including in circuits that Petitioners claim to

be "split" with the Second Circuit – that uphold the application of the filed rate doctrine in situations nearly identical to the current case.

Despite Petitioners' attempt to paint the Second Circuit's summary order as a radical departure from filed rate doctrine law, this is a simple case that challenges the reasonableness of title insurance rates approved by the New York State Insurance Department. Petitioners have failed to establish any compelling reason to review the order. The Petition should be denied.

COUNTERSTATEMENT OF THE CASE

A. The New York State Insurance Department Sets Title Insurance Rates Pursuant to a Legislatively Adopted Regulatory Scheme

In New York, title insurance is governed by a detailed statutory framework. N.Y. Ins. Law § 2301 (Pet. App. at 39a), *et seq.*[1] Pursuant to this comprehensive framework, the New York State Insurance Department has the authority to regulate title insurance rates. *Id.* New York law requires title insurers to file rate proposals with the Superintendent of the Insurance Department. N.Y. Ins. Law § 2305(b) (Pet. App. at 46a-47a). Additionally, "[e]very title insurance corporation shall file with the superintendent its rate manual, if any, its basic schedule of rates and classification of risks, its rating plan and rules in

[1] References to "Pet. App." are to the appendix submitted to this Court by Petitioners with their Petition.

connection with the writing or issuance of policies of title insurance and shall thereafter likewise file any changes therein." N.Y. Ins. Law § 6409 (Pet. App. at 72a).

New York's Insurance Law also expressly authorizes "[c]ooperation among rate service organizations or among rate service organizations and insurers in rate making." N.Y. Ins. Law § 2313(o).[2] Respondent title insurers discharge their filing obligation by maintaining membership in TIRSA, an "association of title insurers licensed as a rate service organization pursuant to Article 23 of the Insurance Law." Compl. ¶ 37 (Pet. App. at 89a). In 1991, the Insurance Department licensed TIRSA to act as a rate service organization. *See* N.Y. State Ins. Dept. Memo. Decision & Opinion, dated Nov. 19, 1991 (Pet. App. at 132a-133a). TIRSA submits information to the Insurance Department on behalf of its members regarding existing insurance rates and proposes changes to those rates. *See* N.Y. Ins. Law § 2313(a). Rates do not go into effect unless and until they are approved by the Insurance Department. N.Y. Ins. Law § 2305(b) (Pet. App. at 46a-47a).

Rate proposals must be "accompanied by the information upon which the insurer supports the rate," N.Y. Ins. Law § 2305(c) (Pet. App. at 47a-48a), which may include the "interpretation of any statistical data [the filing] relies upon," the "experience or judgment of the insurer or rate service organization making the

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[2] The Superintendent has the power to "review such cooperative activities and practices" and conduct hearings to determine if "any such activity or practice is unfair or unreasonable." N.Y. Ins. Law § 2313(o).

rate," the "experience of other insurers or rate service organizations," and "any other relevant factors." N.Y. Ins. Law § 2304(b) (Pet. App. at 41a). The Insurance Department has a duty to ensure that the rate proposals are not "excessive, inadequate or unfairly discriminatory." N.Y. Ins. Law § 2301 (Pet. App. at 39a). Additionally, TIRSA must submit to the Insurance Department a statistical report showing premiums and losses as well as "such other information as the superintendent may deem necessary or expedient for the administration of the provisions" of the Insurance Law addressing insurance rates. N.Y. Ins. Law § 2315(a) (Pet. App. at 52a-53a). Pursuant to this requirement, TIRSA annually files revenue, expense, and loss information with the Insurance Department. Compl. ¶ 38 (Pet. App. at 89a-90a).

Title insurance companies are prohibited from charging any title insurance rate unless and until that rate has been filed with and approved by the New York State Insurance Department. N.Y. Ins. Law § 2305(b) (Pet. App. at 46a-47a). Once the Insurance Department has approved a new title insurance rate, that rate becomes the only legal rate and title insurers are not permitted to deviate from it unless a new rate is filed with and approved by the Insurance Department. N.Y. Ins. Law § 6409(b) (Pet. App. at 72a-73a) ("After any such filing no such corporation shall, in connection with the writing or issuance of any such policy, deviate from the rates, classifications of risks and rules last filed by it, either by making any reduction in rates without having filed the same as herein provided, or by way of any discriminations in favor of or against any insured.").

B. Every TIRSA Rate Filing That Went Into Effect Was Reviewed And Approved By The New York State Insurance Department

During its 19-year existence, TIRSA has made only three filings with the New York State Insurance Department proposing increases in base title insurance rates. After evaluating those three requests and reviewing supporting materials, the Insurance Department rejected one request, reduced another request, and expressly approved every rate that went into effect. First, in March 1993, TIRSA submitted a rate filing to propose "an overall revenue increase of 15.89%," including within that "a proposed 5.5% increase in the title insurance rate level itself." N.Y. State Ins. Dept. Memo. Decision & Opinion, dated Aug. 12, 1993, at 2 (JA 91).[3] After conducting "a comprehensive analysis of the title insurance industry" – which included "perform[ing] independent analyses, appl[ying] different methodologies, and conduct[ing] various tests to determine the proper rate need" – the Insurance Department rejected this rate request. *Id.* at 3 (JA 92). Second, in November 1995, TIRSA submitted a filing requesting a revision in base rates. *See* Apr. 2, 1996 Letter from E. Muhl to G. Paquin (JA 110). The Insurance Department approved this rate request, but only after TIRSA "amended the . . . filing by requesting that the proposed base rate revision be reduced to +6%." *Id.* Finally, on September 26, 2001 – more than five years after the Insurance Department approved the previous rate increase – TIRSA submitted a new rate

[3] References to materials in the Joint Appendix in the Court of Appeals are in the form "JA _."

filing. *See* Nov. 5, 2001 Letter from G. Serio to G. Paquin (JA 111). After the Insurance Department requested and received "follow-up correspondence" from TIRSA, the Department approved the rate filing. *Id.* The basic title insurance rates have not changed in the nine years since the 2001 increase.[4]

C. Petitioners' Complaint Seeks Damages For Alleged "Overcharges" And "Overpayments"

Petitioners do not dispute that every title insurance rate they were charged was expressly approved by the New York State Insurance Department. Nevertheless, they allege that the rates are the result of an illegal price-fixing conspiracy. *See, e.g.*, Compl. ¶¶ 5, 67, 77, 80 (Pet. App. at 80a, 100a, 103a, 104a). Petitioners requested that the district court, among other things, award damages to "compensate them for the overcharges they incurred" and require Respondents to "return to [Petitioners] and the Class all overpayments" made to Respondents. Compl. Prayer for Relief ¶¶ C, E (Pet. App. at 111a); *see also* Compl. ¶ 6 (Pet. App. at 80a) (Petitioners "bring this action to . . . recover damages for the illegal overcharges the Class has paid").

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[4] Insurance Department documents regarding rate filings are state administrative public records, N.Y. Ins. Law § 2305(b)(7) (Pet. App. at 46a-47a), and therefore are judicially noticeable. *See Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991) (permitting district court to take judicial notice of "public disclosure documents required by law to be filed, and actually filed, with the SEC"). Petitioners did not object to the lower courts considering the Insurance Department's public records and, in fact, rely on some of those documents in their Petition. *See, e.g.*, Petition at 7.

D. The Second Circuit Applied The Filed Rate Doctrine To Affirm Dismissal of Petitioners' Complaint In Its Entirety And With Prejudice

Respondents moved to dismiss Petitioners' complaint, and the district court correctly held that "[t]he title insurance rates filed by [Respondents] unquestionably fall under the scope of the filed rate doctrine." Dist. Ct. Order (Pet. App. at 16a). On appeal, the Second Circuit rejected all of Petitioners' arguments as to why the filed rate doctrine should not apply to their claims.

First, the Second Circuit rejected Petitioners' argument that the challenged rates were improperly filed, noting that Petitioners "do not allege [Respondents'] failure to file [the requisite] information." Second Cir. Order (Pet. App. at 4a). Second, the Second Circuit rejected Petitioners' argument that the Insurance Department lacked authority over title agents by affirming that "the Department clearly has authority over title insurance rates." *Id.* (Pet. App. at 5a) (citing N.Y. Ins. Law § 6409(b)). Third, the Second Circuit rejected Petitioners' argument that they merely sought to enforce requirements of New York's Insurance Law, finding that the law "does not confer on plaintiffs a private right of action." *Id.* (Pet. App. at 7a). Fourth, the Second Circuit rejected Petitioners' argument that New York's title insurance regulation is not sufficiently "pervasive" and "comprehensive," holding that the filed rate doctrine applies to "any 'filed rate'" and forbids courts from intervening and "set[ting] New York title insurance rates." *Id.* (Pet. App. at 7a-8a) (internal

citation omitted). The Second Circuit relied on well-settled law from this Court and circuit courts across the country and invoked a key tenet of the filed rate doctrine – the "'historical antipathy to rate setting by courts'" that counsels "respect for the judgment and expertise of regulators charged with approving rates." *Id.* (Pet. App. at 5a) (quoting *Arsberry v. Illinois*, 244 F.3d 558, 562 (7th Cir. 2001) (Posner, J.)).

REASONS FOR DENYING THE PETITION

I. THIS CASE FALLS SQUARELY WITHIN THE WELL-ESTABLISHED CONTOURS OF THE FILED RATE DOCTRINE

The filed rate doctrine has barred complaints like Petitioners' for nearly a century. *Keogh v. Chicago & Nw. Ry. Co.*, 260 U.S. 156 (1922) (affirming dismissal of antitrust challenge to rates filed with ICC). The doctrine holds that "any 'filed rate' – that is, one approved by the governing regulatory agency – is *per se* reasonable and unassailable in judicial proceedings brought by taxpayers." *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 18 (2d Cir. 1994) (emphasis added); *see also* IA PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 247 (3d ed. 2006) ("The doctrine operates as a rule against collateral attack: once filed, a rate may not be collaterally attacked in the courts."). This simple and straightforward doctrine is consistently applied by federal courts across the country. *See, e.g., Tex. Commercial Energy v. TXU Energy, Inc.*, 413 F.3d 503, 507 (5th Cir. 2005) ("The filed rate doctrine bars judicial recourse against a regulated entity based upon allegations that the entity's 'filed rate' is too high, unfair

or unlawful."); *Utilimax.com, Inc. v PPL Energy Plus, LLC*, 378 F.3d 303, 306 (3d Cir. 2004) (The filed rate doctrine "bars antitrust suits based on rates that have been filed and approved by federal agencies."); *Taffet v. Southern Co.*, 967 F.2d 1483, 1494 (11th Cir. 1992) (where administrative agency is given power to "determine the reasonableness of a rate," the ratepayer "'can claim no rate as a legal right that is other than the filed rate'") (quoting *Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251 (1951)).

The filed rate doctrine applies whenever a court is presented with claims that would require it to calculate relief by comparing the rate that was approved by the governing regulatory agency with a hypothetical rate that might have been obtained absent the defendants' challenged conduct. "[O]nly by determining what would be a reasonable rate absent the [alleged conduct] could a court determine the extent of damages. And it is this judicial determination of a reasonable rate that the filed rate doctrine forbids." *Wegoland*, 27 F.3d at 21; *see, e.g.*, *Wah Chang v. Duke Energy Trading & Mktg., LLC*, 507 F.3d 1222, 1226 (9th Cir. 2007) (claims precluded where plaintiff "seeks what amounts to having the courts determine what rates" should have been charged which "would inevitably drag the courts into a determination of what rate would be fair and proper"); *Dreamscape Design, Inc. v. Affinity Network, Inc.*, 414 F.3d 665, 669 (7th Cir. 2005) ("[C]ourts may not award relief . . . that would have the effect of imposing any rate other than that reflected in the filed tariff."); *H.J. Inc. v. Nw. Bell Tel. Co.*, 954 F.2d 485, 488 (8th Cir. 1992) (doctrine bars "claims when the measure of damages is determined by

comparing the approved rate and the rate that allegedly would have been approved absent the wrongful conduct").

As a result, this Court has held in multiple cases that a plaintiff cannot assert claims based on the allegation that a rate filed with a regulatory agency is nonetheless unlawful because it was the result of alleged wrongdoing. *See MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 234 (1994) ("[T]he Court has protected regulated firms from some types of antitrust suits brought on the basis of their filed rates."); *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 422 (1986) ("[A]n award of treble damages is not an available remedy" for a private litigant "claiming that the rate submitted to, and approved by, the [regulatory agency] was the product of an antitrust violation.").

Given this well-settled jurisprudence, the district court and the Second Circuit correctly held that Petitioners' claims are barred by the filed rate doctrine. As the Second Circuit recognized, Petitioners "do not dispute that the challenged title insurance rates are filed with the New York Insurance Department" and "do not allege [Respondents'] failure to file th[e] information" required under the Insurance Law. Second Cir. Order (Pet. App. at 3a-4a). Moreover, Petitioners concede that Respondents' rates "have been submitted and they have been approved" by the Insurance Department. Tr. of Dist. Ct. Oral Arg. at 16:3-6 (JA 184). As the district court held in dismissing this case, "[n]othing more is required for the filed rate doctrine to apply." Dist. Ct. Order (Pet. App. at 16a-17a).

Petitioners ask the courts to do with these filed rates exactly what courts uniformly agree the filed rate doctrine prohibits – usurp the Insurance Department's authority and make a judicial determination of a reasonable rate. Petitioners' requested relief would require a court to entangle itself in the rate-making process and determine a reasonable rate, awarding damages that would "compensate them for the *overcharges* they incurred" and requiring the return of "all *overpayments*" to Respondents. Compl. Prayer for Relief ¶¶ C, E (Pet. App. at 111a) (emphasis added). In order to determine the amount of the "overcharges" or "overpayments," a court would have to determine the rate that should have been charged instead of the filed rate. As the Second Circuit explained, Petitioners "effectively ask[ ] this court to set New York title insurance rates," and "[i]t is clear that the filed rate doctrine forbids [the court] from doing so." Second Cir. Order (Pet. App. at 8a).

Petitioners attempt to escape this inevitable result by arguing that their claims are not "challenges [ ] to the reasonableness of a filed rate." Petition at 4. However, their own words belie that assertion. In the complaint, Petitioners allege that they have had to "pay significantly more for title insurance" than they would have had the Insurance Department calculated the correct rates. Compl. ¶ 98 (Pet. App. at 108a). Petitioners also acknowledge that they seek to have federal courts "'strip from the rates all prohibited and otherwise unauthorized costs.'" Second Cir. Order (Pet. App. at 8a) (quoting Appellants' Br. at 32). This is precisely what the filed rate doctrine forbids. Petitioners cannot now avoid the impact of the filed rate doctrine

by disingenuously stating that their lawsuit is not about conforming filed rates to their view of what is reasonable. *Fax Telecommunicaciones Inc. v. AT&T*, 138 F.3d 479, 490 (2d Cir. 1998) (plaintiff cannot "recharacterize its claim" as plaintiff "may not indirectly accomplish that which it may not do directly").

Petitioners also try to escape the filed rate doctrine by contending that Respondents engaged in unlawful conduct. *See, e.g.*, Petition at 4 (contending that Respondents made "[c]oncerted efforts" to "exploit and exacerbate the regulatory breakdown in New York's title insurance regime" and "pad[ ] their title rates with charges for services entirely unrelated to the issuance of title insurance"); Compl. ¶ 98 (Pet. App. at 108a) (alleging that Respondents "caused substantial anticompetitive effects in the title insurance market" by causing Petitioners to "pay significantly more for title insurance than they would have in the absence of [Respondents'] illegal activity"); *see also, e.g.*, Compl. ¶¶ 3, 55-56, 67, 77-80 (Pet. App. at 79a, 95a-96a, 100a, 103a-104a). But this Court has "never held that a carrier's unreasonable practice justifies departure from the filed tariff schedule." *Maislin Indus. U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 129 (1990). Indeed, this Court has applied the filed rate doctrine in cases just like the present action involving an alleged conspiracy to submit fraudulent inflated rates to a regulator. *See Keogh*, 260 U.S. at 162-63 (doctrine held to bar recovery for antitrust damages against carriers who allegedly colluded to set artificially high shipment rates); *see also Square D*, 476 U.S. at 412 & 417 n.19

(applying filed rate doctrine despite allegations of failure to follow agency procedures and "covert legal violations").[5]

In recent years, numerous district and circuit courts across the country have uniformly held that claims almost identical to Petitioners' – that title insurers engaged in unlawful conduct, including the payment of kickbacks and unlawful agency commissions, in connection with insurance rates filed with the state regulator – are barred by the filed rate doctrine. In so holding, these courts reached conclusions similar to those of the district court and Second Circuit in this case. For example, in a 2009 decision by the district court in the Western District of Texas, later upheld by the Fifth Circuit, the court held:

> Plaintiffs are not alleging they were charged more than the applicable filed rate. Rather, they are claiming that the filed rates are the product of improper conduct. . . . [The] matters at issue within this action fall squarely within the contours of the [filed rate] doctrine.

Winn v. Alamo Title Ins. Co., No. A-09-CA-214-SS, 2010 WL 2102332, at *3, 8 (W.D. Tex. May 14, 2009), *aff'd*, No. 09-50511, 2010 WL 1286890 (5th Cir. Mar. 30, 2010),

[5] Petitioners liken application of the filed rate doctrine to "repeals of the antitrust laws." Petition at 19. But as this Court held in *Square D*, application of the doctrine "is far different from the creation of an antitrust immunity," and entities that engage in anticompetitive activities are still "subject to scrutiny under the antitrust laws," regardless of the doctrine's application. 476 U.S. at 422.

petition for cert. filed, No. 10-19, 2010 WL 2638077 (U.S. June 28, 2010); *see In re Title Ins. Antitrust Cases*, No. 1:08CV677, 2010 WL 1267129 (N.D. Ohio Mar. 31, 2010), *appeal docketed*, No. 10-3545 (6th Cir. Apr. 30, 2010); *In re N.J. Title Ins. Litig.*, No. 08-1425, 2009 WL 3233529 (D.N.J. Oct. 5, 2009), *appeal docketed*, No. 10-3343 (3d Cir. Aug. 10, 2010); *In re Penn. Title Ins. Antitrust Litig.*, 648 F. Supp. 2d 663 (E.D. Pa. 2009); *McCray v. Fid. Nat'l Title Ins. Co.*, 636 F. Supp. 2d 322 (D. Del 2009), *appeal filed* (3d Cir. Aug. 26, 2010); *Coll v. First Am. Title Ins. Co.*, Nos. CIV 06-348, 06-441, 2008 U.S. Dist. LEXIS 112855 (D.N.M. Apr. 21, 2008), *appeal docketed*, No. 08-2174 (10th Cir. July 31, 2008).

Petitioners also suggest that the doctrine should be discounted because it has been criticized. Petition at 16-17. Petitioners disregard, however, that the doctrine has been consistently applied by courts for nearly a century. *See Tex. Commercial Energy*, 413 F.3d at 508 ("[T]he filed rate is very much a part of current federal antitrust law."); *Daleure v. Kentucky*, 119 F. Supp. 2d 683, 689 (W.D. Ky. 2000) ("The Supreme Court has had numerous opportunities to overrule, modify or water down the filed rate doctrine," but has "consistent[ly] refus[ed] to back away from the rule."). Indeed, this Court refused to abolish the filed rate doctrine when it was invited to do so in *Square D*, 476 U.S. at 424 ("If there is to be an overruling of the *Keogh* rule, it must come from Congress, rather than from this Court."); *see also MCI Telecomms.*, 512 U.S. at 234 ("As we observed in the context of a dispute over the filed-rate doctrine more than 80 years ago, 'such considerations address

themselves to Congress, not to the courts.'") (internal citation omitted). The Court more recently held that "[w]hile the filed rate doctrine may seem harsh in some circumstances, its strict application is necessary." *AT&T Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 223 (1998) (internal citation omitted). Even Petitioners concede that the cases they cite where courts allegedly "wrestled with the . . . continued application of the filed rate doctrine," do not "merit revoking the doctrine." Petition at 16-17. Whatever criticisms Petitioners offer, this case does not present compelling circumstances for repealing a doctrine to which the Court has "consistently adhered." *Maislin*, 497 U.S. at 128. The Court has made clear that the proper forum for such complaints is Congress, which has had ample opportunity to modify or abrogate the doctrine but has never done so.

II. CONTRARY TO PETITIONERS' CONTENTION, DISMISSAL OF THIS CASE DOES NOT INVOLVE AN EXPANSION OF THE FILED RATE DOCTRINE

The Second Circuit's summary order was a routine application of the filed rate doctrine to rates concededly filed with and approved by a state regulatory agency. Refusing to acknowledge this fact, Petitioners pitch this case as a frightening expansion of the doctrine that will encourage regulatory agencies to disregard their governing law, positing that the non-precedential summary order of the Second Circuit will lead to agencies "across the country" engaging in either "agency excess or complete abdication" of their responsibility, with no one anywhere having any

recourse.[6] Petition at 13; *see also, e.g., id.* at 3 ("The Second Circuit's decision, if allowed to stand, will invite agencies across the country to ignore both the limits of their statutory authority and the ultimate purpose of their legislative command."). Petitioners base these dire predictions on the specious argument that the New York State Insurance Department exceeds its authority in approving filed rates because it does not directly regulate title agents. *Id.* at 5-6, 9 (suggesting a "clear 'regulatory gap'" because "[t]he Insurance Department does not have regulatory authority over title agents or their activities").

The Insurance Department's role in approving title insurance rates is well within – indeed, it is at the very heart of – the Department's statutory authority over title insurance in New York. Pursuant to the New York statutory regime, and as Petitioners concede, *see* Petition at 5, the Insurance Department is the regulatory agency given sole authority to review and approve title insurance rates in the state of New York. The Department is tasked with regulating "insurance rates to the end that [the rates] not be excessive, inadequate or unfairly discriminatory." N.Y. Ins. Law § 2301 (Pet. App. at 39a). The Insurance Department performs this task by ensuring that no title insurance rate goes into effect "until found to comply with all applicable requirements of the Insurance Law and specifically approved by th[e] Department." N.Y. State

[6] The Petition makes no attempt to square its claim that the Second Circuit's summary order will cause havoc "across the country" with its inaccurate contention that the order is in conflict with decisions of five other circuit courts.

Ins. Dept. Memo. Decision & Opinion, dated Aug. 12, 1993, at 2 (JA 91). In fact, "[a]s part of [its] active supervision of the title insurance industry in New York," the Department conducts "an intensive and independent review of the TIRSA rate and rate manual filings" and "demand[s] meaningful answers on all key issues and significant aspects of the filing." *Id.*

Accordingly, whatever authority the Insurance Department does or does not have over title agents, it indisputably has and exercises authority over TIRSA, its title insurer members, and title insurance rates in New York. As the Second Circuit recognized, "[w]hile title insurance agents are excluded from the definition of 'insurance agent' in New York Insurance Law § 2102(a)(4), the Department clearly has authority over title insurance rates, *see id.* § 6409(b)," and "[t]his case . . . directly contests the latter." Second Cir. Order (Pet. App. at 5a). Moreover, the Department clearly believed that it possessed this requisite authority when it made its rate decisions in 1993, 1996, and 2001 – one of which rejected TIRSA's proposal and one of which reduced TIRSA's proposal. As found by the Second Circuit, "[t]o the extent the Department required more information to review the rates, the superintendent had the authority to require such information . . . ." *Id.* (Pet. App. at 4a). In any event, and as the Second Circuit recognized:

> Even if we were to conclude that the Department lacked the expertise to determine the portion of title insurance rates attributable to alleged illegal commissions, we

> would be no more competent than the Department to set title insurance rates, especially when, as here, the agency is charged with balancing a variety of statutory factors to determine their reasonableness.

Id. (Pet. App. at 5a).

Unable to question the Insurance Department's clear statutory authority to set title insurance rates, Petitioners take a different tack in this Court. Petitioners for the first time focus their briefing – and their question presented – on *In re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631 (1978), a case challenging a suspension by the Interstate Commerce Commission of certain tariffs which Petitioners rely on to claim that "the filed rate doctrine . . . [does not] appl[y] where the agency has acted arbitrarily, capriciously or outside its authority." Petition at 9. Despite the fact that Petitioners made only two passing references to the *Trans Alaska* case in almost 100 pages of briefing before the district court and Second Circuit, they now fault the Second Circuit for "ma[king] no effort to reconcile its decision with" the case. *Id.* at 11. *Trans Alaska*, however, lends no support to Petitioners' claims. The Court in *Trans Alaska* did not even mention the filed rate doctrine, much less limit its application. In fact, the Court specifically held in *Trans Alaska* that "federal courts have no power to make 'an independent appraisal of the reasonableness of rates,'" 436 U.S. at 638 n.17 (internal

citation omitted), which, as described above, *see supra* 12-13, is exactly what Petitioners have asked the courts to do in this case.[7]

Trans Alaska does, however, illustrate the remedy that Petitioners could have pursued for the alleged shortcomings of the New York State Insurance Department. *Trans Alaska* involved an action filed against a regulatory agency challenging the scope of that agency's authority, not an antitrust action against private parties challenging their adherence to rates filed with and approved by the regulatory agency. Petitioners complain that the Insurance Department "has no understanding of the costs and services [the rates] are supposed to cover," Petition at 2, that it "arbitrarily accept[s] and approve[s] respondents' collectively-set title rates," *id.* at 8, that it "violate[s] its mandate of ensuring reasonable title rates," *id.* at 9, and that it acted "arbitrarily," "capriciously," and "outside its authority" in approving the rates in question, *id.* If those are Petitioners' concerns, New York law provides Petitioners a remedy in the form of an Article 78

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[7] Most of the additional cases that Petitioners cite to support their argument regarding application of the filed rate doctrine similarly do not even mention the doctrine. *See* Petition at 10 n.5. Of the remaining cases, one concerns filed rate claims that are specifically provided for by statute, which is not an issue in this case, *Reiter v. Cooper*, 507 U.S. 258 (1993); *see* Second Cir. Order (Pet. App. at 6a), and another actually applies the filed rate doctrine to bar claims challenging rates and schedules filed with regulators, recognizing that "any claim for excessive rates can be couched" as a claim for other things. *AT&T Co.*, 524 U.S. at 223 (holding that "strict application [of the filed rate doctrine] is necessary").

proceeding against the Department. *See* N.Y. C.P.L.R. 7803(3) (Article 78 proceedings are intended to address "whether a determination was made *in violation of lawful procedure* . . . or was *arbitrary and capricious* or an abuse of discretion") (emphasis added). Such a proceeding would be more appropriate than a treble damages federal antitrust case, to which the Insurance Department is not even a party, based on alleged violations of New York state law. *See, e.g., In re Empire Blue Cross & Blue Shield Customer Litig.*, 622 N.Y.S.2d 843, 846-47 (N.Y. Sup. Ct. 1994) (holding that "inasmuch as plaintiffs' claims . . . are essentially challenging the rates set by [the New York State Insurance Department] as excessive, they are more appropriately pursued in a CPLR Article 78 proceeding," and that "the 'filed rate' doctrine also bars the claims alleged"); *see also Excellus Health Plan, Inc. v. Serio*, 809 N.E.2d 651 (N.Y. 2004) (authority of Superintendent of Insurance Department to review and modify premium rates challenged by health maintenance organization in Article 78 proceeding).

III. PETITIONERS ATTEMPT TO CONCOCT A CIRCUIT SPLIT THAT DOES NOT EXIST

Unable to contest effectively the Second Circuit's application of the filed rate doctrine to bar their claims, Petitioners claim that the Second Circuit's unpublished summary order "directly conflicts" with decisions of the Fifth, Eighth, Ninth, Tenth, and Federal Circuits. Petition at 3. No circuit split exists.

Petitioners broadly claim that courts in other circuits have "explicitly refused to expand the [filed rate]

doctrine" to apply to "an agency that has acted outside its authority." Petition at 13. But, in not one of the cases cited by Petitioners did a court refuse to apply the filed rate doctrine on grounds that a regulatory agency surpassed its statutory authority. In fact, the cases that Petitioners cite to support their concocted circuit split have no bearing on the application of the filed rated doctrine in this action. In many of those cases, the determination not to apply the doctrine was based on factors absent from this case, such as the fact that the rate filings were incomplete and therefore undecipherable on their face, *see Atlantis Express, Inc. v. Associated Wholesale Grocers, Inc.*, 989 F.2d 281, 284 (8th Cir. 1993) (rate void where carrier failed to file portion of rate and "it was impossible to calculate the rate from the information [carrier] properly filed"); *Aberdeen & Rockfish R.R. Co. v. U.S.*, 682 F.2d 1092 (5th Cir. 1982) (filing invalid where it failed to identify rate changes in symbolized form as required), *vacated*, 467 U.S. 1237 (1984), or that the rates directly contravened a statute requiring that carrier rates charged to the military not be higher than rates charged to private shippers, *see Sea-Land Servs., Inc. v. Danzig*, 211 F.3d 1373, 1380 (Fed. Cir. 2000). In other cases cited by Petitioners, the courts addressed the ability of a regulatory agency – not a court – to require departure from the filed rate. *See Interstate Commerce Comm. v. Transcon Lines*, 513 U.S. 138 (1995) (filed rate doctrine does not bar injunction sought by regulatory agency to enforce its own credit regulations); *Davel Commc'ns, Inc. v. Qwest Corp.*, 460 F.3d 1075 (9th Cir. 2006) (doctrine does not preclude lawsuit to enforce regulator's order requiring departure from filed rates).

Petitioners label *TON Services, Inc. v. Qwest Corporation*, 493 F.3d 1225 (10th Cir. 2007), as being "particularly on point." Petition at 14. As the Second Circuit expressly held, that case is no more applicable to the present action than the others. Second Cir. Order (Pet. App. at 6 n.1). In *TON Services*, the Tenth Circuit considered application of the filed rate doctrine to claims for refunds on rates charged by local exchange carriers to payphone service providers. The court determined that the doctrine did not apply because the defendant had allegedly "failed to timely file tariffs" and because the case did not involve "a challenge to the reasonableness of [defendant's] rates." 493 F.3d at 1237. In fact, the regulatory agency itself (the Federal Communications Commission) had put the telecommunications industry on notice that a refund might be necessary, and the agency's governing statute expressly granted a private federal right of action to challenge the rates. *Id.*; Second Cir. Order (Pet. App. at 6a n.1). In the present case, no comparable order or statute exists, no allegation exists that Respondents did not timely file title insurance rates, and Petitioners' claims challenge the reasonableness of the filed rates. Contrary to Petitioners' portrayal of the case, the opinion in *TON Services* stated that courts have "no power to adjudicate claims which would invalidate, alter, or add to the terms" of defendants' filed rates, 493 F.3d at 1236 (citation and quotation marks omitted), which is exactly what Petitioners seek to do in this case.

Although Petitioners describe the Ninth Circuit's decision in *E & J Gallo Winery v. EnCana Corp.*, 503 F.3d 1027 (9th Cir. 2007), as "similarly on point," Petition at 15, that case also is inapposite. In *Gallo*, a customer

sued a natural gas supplier for illegal pricing practices. The Ninth Circuit held that the filed rate doctrine was not applicable because the rates at issue were not filed with a regulator and the indices to which the rates were pegged were "comprised of rates that are not [agency]-authorized rates." 503 F.3d at 1048. The Court held, however, that the doctrine *did* in fact apply to "authorized rates." *Id.* Unlike in *Gallo*, no question exists as to whether Respondents filed the title insurance rates with the appropriate regulatory agency.

Petitioners also cite *Brown v. Ticor Title Insurance Co.*, 982 F.2d 386 (9th Cir. 1992), in which they contend the Ninth Circuit refused to apply the filed rate doctrine because "the agencies at issue there – like the New York Insurance Department here – lacked the authority to assess the reasonableness of the filed rates." Petition at 15. In reality, the Second Circuit found in the present case, based on New York Insurance Law, that the New York State Insurance Department has the authority to review and approve title insurance rates. *See* Second Cir. Order (Pet. App. at 5a). Moreover, the record demonstrates that the Department exercised that authority to review rate filings. *See supra* 6-7.

Not only is there no circuit split with regard to the application of the filed rate doctrine in cases like the present action, but numerous cases decided by federal courts across the country – including circuits that Petitioners accuse of a "clear split" with the Second Circuit – uphold application of the doctrine in situations almost identical to this action. *See supra* 14-15; *Winn v. Alamo Title Ins. Co.*, No. 09-50511, 2010 WL 1286890 (5th Cir. Mar. 30, 2010), *petition for cert. filed*, No. 10-

19, 2010 WL 2638077 (U.S. June 28, 2010); *In re Title Ins. Antitrust Cases*, No. 1:08CV677, 2010 WL 1267129 (N.D. Ohio Mar. 31, 2010), *appeal docketed*, No. 10-3545 (6th Cir. Apr. 30, 2010); *In re N.J. Title Ins. Litig.*, No. 08-1425, 2009 WL 3233529 (D.N.J. Oct. 5, 2009), *appeal docketed*, No. 10-3343 (3d Cir. Aug. 10, 2010); *In re Penn. Title Ins. Antitrust Litig.*, 648 F. Supp. 2d 663 (E.D. Pa. 2009); *McCray v. Fid. Nat'l Title Ins. Co.*, 636 F. Supp. 2d 322 (D. Del 2009), *appeal filed* (3d Cir. Aug. 26, 2010). There is no split among the circuits to be addressed here.

CONCLUSION

For all of the reasons set forth above, the Petition for Writ of Certiorari should be denied.

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IN THE

Supreme Court of the United States

BRENDAN DOLAN, *et al.*,
Petitioners,

v.

FIDELITY NATIONAL TITLE INSURANCE COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
1. RESPONDENTS DO NOT DISPUTE THAT COURTS ARE EMPOWERED TO DETERMINE WHETHER AN AGENCY HAS OVERSTEPPED THE BOUNDS OF ITS AUTHORITY	3
2. RESPONDENTS MISCHARACTERIZE THE QUESTION PRESENTED IN THE PETITION	3
3. RESPONDENTS' "CENTURY" OF FILED RATE CASES DID NOT DEAL WITH THE QUESTION OF AGENCY AUTHORITY	5
4. THE SECOND CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH THOSE DECISIONS THAT DID DEAL WITH AGENCY AUTHORITY	6
5. THE SECOND CIRCUIT'S DECISION REPRESENTS AN UNPRECEDENTED EXPANSION OF THE FILED RATE DOCTRINE THAT SHOULD BE CORRECTED	8
CONCLUSION	9

TABLE OF AUTHORITIES

CASES	Page
Aberdeen & Rockfish R.R. Co. v. United States, 682 F.2d 1092 (5th Cir. 1982)	7
Brown v. Ticor Title Ins. Co., 982 F.2d 386 (9th Cir. 1992)	6
Chevron U.S.A., Inc. v. Natural Res. Def. Counsel, Inc., 467 U.S. 837 (1984)	3
E&J Gallo Winery v. Encana Corp., 503 F.3d 1027 (9th Cir. 2007)	7
In re Pennsylvania Title Ins. Antitrust Litig., No. 08-01202, 2009 WL 2190669 (E.D. Pa. July 21, 2009)	5
In re Trans Alaska Pipeline Rate Cases, 436 U.S. 631 (1978)	2, 3, 6, 8
Leedom v. Kyne, 358 U.S. 184 (1958)	3
McCray v. Fidelity Nat'l Title Ins. Co., 636 F. Supp. 2d 322 (D. Del. 2009)	5
Sea-Land Serv., Inc. v. Danzig, 211 F.3d 1373 (Fed. Cir. 2000)	7
Security Servs., Inc. v. K Mart Corp., 511 U.S. 431 (1994)	7
Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409 (1986)	2
TON Servs., Inc. v. Qwest Corp., 493 F.3d 1225 (10th Cir. 2007)	7
Winn v. Alamo Title Ins. Co., No. A-09-CA-214-SS, slip op. (W.D. Tex. May 14, 2009)	5-6

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REPLY BRIEF FOR PETITIONERS

The central failing in respondents' opposition is that it entirely sidesteps the Question Presented in the Petition. That question is whether a court may apply the filed rate doctrine to an agency that has acted outside its authority or in an arbitrary and capricious manner. In applying the doctrine to the New York Insurance Department's acceptance and approval of respondents' collectively-set title insurance rates, that is precisely what the Second Circuit did. It applied the doctrine even though the Insurance Department does not know what goes into these filed rates, and even though they are comprised of

costs that are unrelated to title insurance, explicitly barred under the Insurance Law, and otherwise lie outside the Insurance Department's jurisdictional reach. No other court has ever applied the filed rate doctrine in the face of such a regulatory breakdown.

But respondents do not address petitioners' question of agency authority and failure. Instead, they focus exclusively on the very different (and well-settled) question of whether the filed rate doctrine applies to a challenge to the reasonableness of filed rates. Nowhere is this more evident than in respondents' one-sided treatment of *Trans Alaska*. This Court made a clear distinction in that case between a challenge to the reasonableness of a filed rate and a challenge to an agency acting outside its authority. Respondents ignore that distinction entirely. They do not even acknowledge the clear limits it places on the filed rate doctrine.

The Second Circuit's *per se* application of the filed rate doctrine expands the doctrine further than any court to date by removing any limits to its application—mere agency filing and approval is enough. It is hardly in line with the "century" of filed rate decisions to which respondents point, or with the underlying purpose of the doctrine itself. The court's decision sets a particularly dangerous precedent in insulating agency failures and those—like respondents—who seek to exploit them. This case is far removed from the mundane application of the doctrine respondents pretend it is. It presents an important opportunity for the Court to speak to whether there are in fact *any* limits to this widely criticized doctrine which, as this Court recognized in *Square D*, has survived largely on *stare decisis* grounds alone.

1. RESPONDENTS DO NOT DISPUTE THAT COURTS ARE EMPOWERED TO DETERMINE WHETHER AN AGENCY HAS OVERSTEPPED THE BOUNDS OF ITS AUTHORITY

It is plainly within the province of courts to inquire "whether [an agency] has overstepped the bounds of its authority." *In re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 638 n.17 (1978). Respondents do not dispute this well-founded principle. Nor could they. It has been recognized by the Supreme Court for more than half a century. *See Leedom v. Kyne*, 358 U.S. 184, 188 (1958); *Chevron U.S.A., Inc. v. Natural Res. Def. Counsel, Inc.*, 467 U.S. 837, 844 (1984); and other cases cited in Pet. at 10 and at 10 n.5.

Respondents also do not dispute the clear distinction laid out in *Trans Alaska* between assessing the reasonableness of filed rates versus assessing whether an agency has exceeded its authority in reviewing and approving them. Only the former inquiry is barred under the filed rate doctrine, not the latter. After all, the underlying rationale of the filed rate doctrine—deferring to agency authority and expertise—only makes sense and can only be applicable if the agency has properly exercised that authority and expertise in the first place.

2. RESPONDENTS MISCHARACTERIZE THE QUESTION PRESENTED IN THE PETITION

The Petition goes only to this latter question of agency authority. Yet, respondents do not address that question at all. Instead, they mischaracterize the relevant question here as one that concerns the

ability of a court to assess the reasonableness of filed rates. *See, e.g.*, Opp. at 3 ("this is a simple case that challenges the reasonableness of title insurance rates").

But this is a very different case. It involves an agency that has admitted that it does not see 85 percent of the costs that comprise the rates it approves; that has admitted that it has no statutory authority or ability to obtain this needed cost information; that does not know the services these rates actually cover; and that approves rates that violate the clear provisions of the governing law. Petitioners do not challenge these rates for their reasonableness. Rather, petitioners challenge the Insurance Department's authority in this regulatory context to accept and approve these rates at all.[1]

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[1] The Insurance Department's general authority over title insurance rates to which respondents and the Second Circuit point (Opp. at 17-19), does not give it the authority to accept and approve rates filed under these circumstances. Nor can respondents paper over this regulatory failure by pointing to a 1993 Insurance Department opinion which refers to the Department's supposed "intensive" review of respondents' rate filings. Opp. at 18. Without authority over title agents and their costs, this intensive review did not—and could not—cover the 85% portion of respondents' rates comprised of agency commissions. The Department's three rate decisions that respondents highlight (Opp. at 6-7, 18) likewise did not include any consideration of agency commissions. Therefore, they too fail to speak to the Department's lack of authority over this essential cost information and the Department's arbitrary and capricious conduct in accepting and approving respondents' rates without it.

3. RESPONDENTS' "CENTURY" OF FILED RATE CASES DID NOT DEAL WITH THE QUESTION OF AGENCY AUTHORITY

No other court has taken the filed rate doctrine this far. Respondents are therefore incorrect in their overarching contention that the Second Circuit's decision is "in line with nearly a century of this Court's case law and the decisions of other circuit courts across the country." Opp. at 1. None of the decisions in this "century" of case law involved a regulatory failure like the one at issue here. And none of them involved a challenge to the agency's authority to accept and approve the filed rates in the face of such a failure. They simply involved direct challenges to the reasonableness of the filed rates, an issue that is not before this Court.

Thus, respondents' litany of filed rate cases has no application here. This is particularly evident with the "numerous district and circuit courts across the country" that have purportedly applied the filed rate doctrine to bar title insurance challenges "almost identical" to petitioners' challenge here. Opp. at 14. None of these cases involved a challenge to agency authority. In fact, three of them made clear that had there been such a challenge, the filed rate doctrine would not have applied.[2] Furthermore, notably

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[2] *See* Opp. at 14-15 (citing *In re Pennsylvania Title Ins. Antitrust Litig.*, No. 08-01202, 2009 WL 2190669, at *9 (E.D. Pa. July 21, 2009) ("for a court to consider rates filed, and thus protected by the filed rate doctrine, the statutory scheme must provide the regulatory agency with authority to assess rates' compliance with statutory requirements for filed rates"); *McCray v. Fidelity Nat'l Title Ins. Co.*, 636 F. Supp. 2d 322, 331 (D. Del. 2009) (applying doctrine only after finding that insurance department "is fully empowered to regulate" the filed rates); *Winn v. Alamo Title Ins. Co.*, No. A-09-CA-214-SS, slip op. at 8-

absent from respondents' discussion of these supposedly identical cases is any mention of *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), the one title insurance case that actually did involve such a challenge. There, the Ninth Circuit refused to apply the doctrine to insurance departments that—like the New York Insurance Department here—lacked the ability and authority to assess the reasonableness of the filed rates.

4. THE SECOND CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH THOSE DECISIONS THAT DID DEAL WITH AGENCY AUTHORITY

The Second Circuit's decision directly conflicts with this Court's clear holding in *Trans Alaska* and elsewhere that no principle of agency deference can apply when the agency has acted arbitrarily, capriciously or outside its authority. Respondents cannot escape this precedent by suggesting that it does not apply in the filed rate context. Opp. at 19-20, 20 n.7. *Trans Alaska* clearly says that it does. So does the very purpose of the filed rate doctrine itself.[3]

9, 12 (W.D. Tex. May 14, 2009) (JA237-238, 241) (applying doctrine only after finding that insurance regime is "[n]otably" and "[s]ignificantly" subject to "comprehensive regulation")).

[3] Nor can respondents escape this limitation on the filed rate doctrine by arguing that petitioners raised it only "passing[ly]" below. Opp. at 19. They did not. Petitioners have raised *Trans Alaska* and the issue of agency authority at every stage and in every brief in this litigation. Equally unavailing is respondents' contention that an Article 78 proceeding provides a more appropriate forum. Opp. at 20-21. Petitioners have brought this case under the United States antitrust laws. The federal courts are the *only* forum where petitioners could have brought this case. Moreover, an Article 78 proceeding could not even be

The Second Circuit's *per se* application of the filed rate doctrine also directly clashes with those circuit court decisions that explicitly refused to expand the doctrine that far. Respondents' attempt to distinguish these cases "based on factors absent from this case" misses the point. Opp. at 22. The refusal by these courts to apply the doctrine flatly rejects the Second Circuit's decision that mere agency filing and approval are enough. In each of these decisions, the circuit courts looked beyond mere filing and approval to assess such issues as agency authority and whether the subject rates comported with the governing law.[4] The Tenth Circuit in *TON* even went so far as to hold that it would be "impossible" to apply the filed rate doctrine without first resolving these kinds of issues. 493 F.3d at 1237 n.15.

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brought against respondents. It can only be brought against the agency.

[4] *See, e.g., TON Servs., Inc. v. Qwest Corp.*, 493 F.3d 1225, 1234, 1237 (10th Cir. 2007) (refusing to apply doctrine because defendant's failure to provide "supporting cost data" prevented agency from determining compliance with governing law); *E&J Gallo Winery v. Encana Corp.*, 503 F.3d 1027, 1045, 1048-49 (9th Cir. 2007) (refusing to apply doctrine to filed rates outside agency's authority); *Sea-Land Serv., Inc. v. Danzig*, 211 F.3d 1373, 1380 (Fed. Cir. 2000) (refusing to apply doctrine because filed rate was "contrary to a statutory prohibition"); *Aberdeen & Rockfish R.R. Co. v. United States*, 682 F.2d 1092, 1102 (5th Cir. 1982) (refusing to apply doctrine because filed rate was "not filed and published in accordance with statutory or regulatory provisions"); *Security Servs., Inc. v. K Mart Corp.*, 511 U.S. 431, 440 (1994) (refusing to apply doctrine because filed rate "lacked an essential element").

5. THE SECOND CIRCUIT'S DECISION REPRESENTS AN UNPRECEDENTED EXPANSION OF THE FILED RATE DOCTRINE THAT SHOULD BE CORRECTED

The bottom line is that the Second Circuit's mechanical application of the filed rate doctrine has taken the doctrine well beyond where any court has taken it before, and well beyond its original design. No amount of respondents' tinkering can squeeze this case into a simple challenge to the reasonableness of respondents' filed rates. Nor can it reconcile the Second Circuit's decision with *Trans Alaska* and this Court's related precedent, or with the decisions of other circuit courts which refused such a rigid application of the doctrine. The fact is that if these other courts had adopted the *per se* approach the Second Circuit adopted here, they would not have refused to apply the doctrine as they did. Mere filing and approval would have been enough.

The Second Circuit's expansion of the filed rate doctrine is in particular need of this Court's attention and correction because of the extent of the agency failure the Second Circuit (and respondents) ignored. This is a failure that the Insurance Department has repeatedly acknowledged (and called for legislation to fix) and that the General Accountability Office confirmed in its 2007 study. Petition at 7-8. Respondents point to no precedent or purpose for applying the doctrine in this regulatory context. There is none. Permitting a regulated entity to exploit this kind of regulatory failure—outside of both antitrust and regulatory review—is certainly not what the filed rate doctrine was designed to accomplish. But if left

to stand, that is exactly what the Second Circuit's decision will do.

CONCLUSION

For the reasons stated above and in the Petition for a Writ of Certiorari, the Petition should be granted.

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